1998

State of Utah v. Barrett Wynn and Larry Smith : Brief of Appellant

Utah Court of Appeals

Tracey Eugene Smith; Appellant Pro Se.
James H. Beadles; Assistant Attorney General; Jan Graham; Attorney General; Attorneys for Appellee.

DOCKET NO. 980056-CA

IN THE COURT OF APPEALS, STATE OF UTAH

STATE OF UTAH, Plaintiff/Appellee vs. TRACY EUGENE SMITH, Defendant/Appellant.	Case No# 980056-CA BLUE COVER SHEET

APPEAL FROM THE DENIAL OF DEFENDANT'S MOTION FOR CORRECTION OF SENTENCE IMPOSED IN AN ILLEGAL MANNER/MOTION TO WITHDRAW GUILTY PLEA ENTERED BY THE HONORABLE J. PHILIP EVES, JUDGE OF THE 5th JUDICIAL DIST. COURT BEAVER COUNTY, UTAH ON THE 30th DAY OF SEPTEMBER 1997....

TRACY EUGENE SMITH
Without Counsel
Utah State Prison
P.O. Box 250
Draper, Utah 84020

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ATTACHMENTS:

Attachment I - Reporter's Hearing Transcript (Plea Colloquy / Sentencing Colloquy).

Attachment II - Memorandum In Opposition To Respondent's motion To Dismiss Habeas Petition, Case No# 920553 / 93-0900217 (with Relevant Letters From Attorney Cook)

Attachment III - State Supreme Court Opinio. [Appellate Decision State v. Smith, 920141]

Attachment IV - Judge Eves Memorandum Decision Case No# 631 State v. Smith, 30 Sept 1997.

Attachment V - Judge Eves Memorandum of Points of Authorities Case No# 631 State v. Smith., 21 August 1997.

Attachment VI - Judge Eves Memorandum

Opinion, Case No# 631 State v. Smith, 3 July 1996.

Attachment VII, Statement/Affidavit of Plea of Defendant.

NOTE: On the basis that appellant is proceeding without counsel and does not have access to check out the record in this case from the clerk he has attached all relevant decisions and documents to his principle brief* and directly references to each as Attachments.

Mr. Smith also reserves the right to renew his motion for appointment of counsel if this court determines oral argument will aid in determing any aspect of this appeal including his argument that the trial court failed to properly apply the Supreme Court's Opinion of State v. Holland (infra) to Smith's ineffective assistance of counsel claim.

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* which are in his possession

Table of Authorities

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Relevant Constitutional Provisions

State Const Art I §12 In all criminal prosecutions the accused shall have the right to appear and defend ... by counsel.

Const. U.S. Amend. VI ... the accused shall ... have the Assistance of counsel for his defence.

Const. U.S. Amend XIV Section I;

With respect to Smith's claim of entitlement to the retroactive application of State v. Holland, (infra) it is noted that Utah Courts have taken an "intermediate" position concerning retroactivity where "the Court has applied a change in the law to all future litigants but retroactively only to the parties at bar." See Andrews v. Morris, 677 Pad. 81, 89 (Utah 1983). Labrum, (infra)

PREVIOUS MOTIONS / APPEALS FOR PRIOR PETITIONS

Mr. Smith originally had a direct appeal from the denial of his initial Motion for Leave To Withdraw Guilty Plea which was reviewed by the Utah State Supreme Court Case No# 920141 See infra. A petitic for writ of habeas corpus was also filed or his behalf by Craig S. Cook, court appoin ed counsel and was denied by The Hon. Judge Young of the 3rd Dist. Court Case No# 930900217[a]. No appeal from the denia of this habeas petition was taken. Smith alleges herein that he was denied effective assistance of counsel on direct appeal; And was prevented from previously assertins this cause because the same attorney who represented Smith on direct appeal was co-laterally representins him in this petition

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a. Said petition was originally filed in the Utah State Supreme Court as Case No# 920553 bu transferred to the 3rd Dist. Court (93090021 pursuant To Rule 20 Ut. R. App. Proc.

(see infra).

Mr. Smith had filed a previous petition for writ of habeas before the honorable Judge Rigtrup (Case No# 910901055). Smith was represented by court-appointed counsel Glenn T. Hale of Dunn & Dunn. This counsel perfected no appeal from Rigtrup's denial of Smith's Habeas Petition entered on or about 27 July 1992.

Again, after wading through ineffective assistance of counsel on direct appeal and two court-appointed counsel's failures to appeal from adverse rulings on his habeas petitions, Smith once again sought relief in the trial court in May of 1996 in the form of a Motion for Correction of Sentence... which was denied and appealed. This court in a Memorandum Decision dated 3 April 1997 (Case No# 960689-CA) denied Smith's appeal and Remitted on May 12, 1997. Smith had no assistance of counsel on this appeal as well.

Smith does not have copies of any of the above decisions (excluding the one entered in Case No# 920141 which is hereto attached). Smith however has attached the latest Rulings entered by the trial court from which this appeal is now taken.

TRACY EUGENE SMITH
Defendant/Appellant
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IN THE COURT OF APPEALS, STATE OF UTAH

STATE OF UTAH Plaintiff/Appellee, vs. TRACY EUGENE SMITH Defendant/Appellant.	Case No# 980056-CA BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This case was transferred to this Court by the Utah State Supreme Court on or about 3 February 1998 pursuant to the provisions of Rule 42(a) of the Utah Rules of Appellate Procedure. This Court has Jurisdiction over this appeal pursuant to U.C.A

78-2a-3 (2) (K) (1995).

STATEMENT OF ISSUE(S) PRESENTED FOR REVIEW

1. Was It Incorrect for the trial Court To Deny The Defendant's Motion For Correction of Sentence Imposed In An Illegal Manner (Alternatively Styled Motion For leave To Withdraw Guilty Plea), On The Legal Grounds That Defendant's claims were barred by the statute of Limitations when, The Record Conclusively shows That The Defendant Was NOT Fully Advised OF The Consequences Of His Pleas.

2. Was It Incorrect for the trial court to deny Mr. Smith's request to withdraw his guilty plea in light of the fact that he was denied effective assistance of counsel (prior to and) at the time he entered his pleas; As well as on his appeal of first right.

STANDARD OF REVIEW

Clear Abuse of Discretion. . . . State v. Vasilacopules, 756 P2d. 92. 93 (Utah Ct. App. 1988).

Correctness, which "means the appellate Court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." State v. Pena, 869 P2d 932, 936 (Utah 1994).

STATEMENT OF THE CASE

This is an appeal from Judge J. Philip Eves Memorandum Decision entered below on the 30th day of September 1997 and denying Mr. Smith's Motion For Correction of Sentence Imposed In An Illegal Manner (Alternatively styled Motion For Leave To Withdraw Guilty Plea).

B. Course of Proceedings and Disposition of The Case Below / Facts:

From the outset this case has a tortuous

history. The defendant, Tracy Eugene Smith was initially charged, bound over, arraigne. convicted and sentenced for "Capital Homicide (under 76-5-202 (1) (d)) in circa 42 days to Life with parole stemming from the death of James Glen Bray at a Rest Area in Beaver County, Utah on or about 3 October 1988.

The defendant on the advice of State Court appointed counsel James L Shumate, entered a plea of guilty to Capital Murder on 14 November 1988 Court Appointed Counsel at the time of handling the defendants case, possessed absolutely no experience in Capital Homicid cases and based upon information and belief had no criminal "trial" experience whatsoever.

The State initially offerred the defendant a plea-bargain agreement to Second Degree Homicide under U.C.A. 76-5-203

but after conferring with Mr. Hans Q Chamberlain Esq, (attorney for the victim family) this agreement was changed. Compare Defendant's initial motion to withdraw guilty plea filed in December 1988 - Jan. 198 see also Reporter's Hearing Transcript generally. Attachment I hereto.

The sole basis for charging the defendant with Capital Murder or Homicide during the attempted commission of a robbery was the statement made at Mr Smith's preliminary hearing by a hitchhike whom Mr Smith offerred a ride to the effect that "Mr Smith looked like he was going to rob someone." [Prelim Transcript Testimony of Timothy Michael Miller].

Mr. Smith, at the time of the offense was a native of the State of California. Under California State Law, a Life sentence is generally 15 years.

The Court, prior to accepting Mr Smiths pleas failed to properly advise the defendant of the possible consequence

or penalties that may be imposed on Mr. Smith's plea of guilty to Capital Murder as evidenced by the following colloquy:

> ... if you plead guilty under the conditions of this agreement, this would entail a conditional plea, meaning that you would plead guilty upon basically a commitment by the Court that a Life sentence would be the punishment that would be imposed as opposed to death. And if the Court, in fact, pronounced the death sentence, you would have the right to withdraw your plea.
>
> Do you understand that?
>
> MR. SMITH: Yes sir.
>
> THE COURT: All right. Do you have any questions about the nature of the charges against you or the possible penalties? (emp. added) Nov. 14, 1988 Hearing Transcript. Attach. I

The court then subsequently sentenced Mr Smith as follows:

> ... Tracy Eugene Smith, having been convicted by your own plea of the offense of murder in the first-degree, a capitol offense, in violation of the laws of the state of Utah, I now sentence you to the Utah State Prison <u>for the rest of your natural life.</u> (emp. added)
>
> I'm also going to make a recommendation to the board of pardons, which I would like included in the order, that Mr Smith serve 20 years before he's considered to be released from the Utah State Prison. (Transcript at 22). Attach. I.

On this advice of counsel Mr Smith waived the time for sentencing and was deprived any opportunity of a pre-sentence report and/or investigation.

Immediately after arriving at the Utah Department of Corrections the defendant discovered that his sentence was for "Natural" Life and filed a motion for leave To Withdraw Guilty Plea. This matter was called for a hearing at which time Mr Shumate once again was representing the defendant. Mr Shumate induced the defendant into withdrawing his motion for leave to withdraw guilty plea and to "seek relief in the federal court." Mr Shumate knew or reasonably should have known that a defendant cannot seek relief in the Federal Court system prior to exhausting his state remedies. This fact alone represents either Mr Shumate's legal inexperience and ineffectiveness or in the alternative, a deliberate attempt to sabotage Mr Smiths post-conviction remedies. In either case, it is a procedural default attributable to the State not Mr. Smith.

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1. See Petitioners Memorandum In Opposition To Respondent's Motion To Dismiss Habeas Corpus pg 3 Case No# 920553 Ut St. Supreme Ct. Attachment II hereto 18.5

After discovering that he could not seek relief in "federal court" as per Mr Shumate's instruction the defendant struck out once again on his own and filed a subseque Motion for Leave To Withdraw Guilty Plea on December 4, 1991.

Subsequently Attorney Craig S. Cook took on appeal from the denial of Mr Smith Motion For Leave To Withdraw Guilty plea which was denied by the Utah State Supre. Court (See Attachment III hereto). Despite the fact that the Supreme Court denied the appeal from the motion for Leave To Withdraw Guilty Plea the Court nevertheless held with qualification as follows:

> The issue that appellate counsel urges us to address for the first time on appeal is whether the trial court erred in entering a twenty-year

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2. And simultaneously filed a Petition for Writ of Habeas Corpus. No 920552 Ut. St. Supreme C.

recommendation of incarceration with respect to Smith's prison sentence. Counsel asserts that there was no factual record before the trial court justifying that recommendation. We refuse to address the issue. emp. added.

... However, the district court may address the issue of the twenty-year recommendation in Smith's pending petition for a writ of habeas corpus. Id pg 2-3 Attachment III hereto.

This "pending petition for writ of habeas corpus" referenced above by the Supreme Court was determined by Judge Young of the 3rd Judicial District Court in January 13, 1994 Case No# 93-0900217. It is not clear from the record in Mr Smith's possession whether or not this issue was considered by the lower court.

During both the direct appeal from the denial of Mr Smith's Motion For Leave To Withdraw His Guilty Plea (Case No# 920141 - UT St. S.CT.) and the petition for writ of habeas corpus reference above (No# 93-0900217 before judge Young) Mr Smith was represented by Court appointed counsel Craig Stephens Cook.

Mr. Cook failed to take an appeal from the denial of the defendant's habeas corpus petition. Normally, such a failure would be detrimental to a cause of action, ironically however, Mr Cook who was appointed by the state to represe. Mr Smith in his "direct appeal of first right" from the denial of his Motion For Leave To Withdraw Guilty Plea, failed to properly raise the question of "ineffecti. assistance of trial counsel" in the appeal of first right. In fact, Mr Cook attempted to have the appeals court decide that issue presented for the first time on appeal but the Supreme Cour

declined to address that issue. Not to be undaunted however, Mr Cook in an attempt to correct his failure to properly raise the question of ineffective assistance of counsel simultaneously and collaterally raised this subject via petition for writ of habeas corpus (Case No.# 93-0900217) a case from which he failed to appeal.

In short, because the state chose to appoint Mr Cook to represent Mr Smith on direct appeal and that counsel failed to properly and/or fully raise the issue of ineffective assistance of trial counsel Mr Smith was deprived his constitutional right to effective assistance of counsel on appeal (Case No # 920141).

Failure of court-appointed counsel to propely present Mr Smith's claims of ineffective assistance of counsel on direct appeal whether or not coupled with that same counsel's failure to appeal from an adverse ruling on Mr Smith's

petition for writ of habeas corpus is the equivilent of having no counsel on appeal. In this context, the U.S. Supreme Court has held that it is error to deny indigent defendants representation during a appeal of first right because defendant is left without representation during appellate court's actual decision-making process Penson v. Ohio, 488 U.S. 75, 85 (1988); Evitts v. Lucey, 469 U.S. 387 396 (1985) (due process clause requires effective assistance of counsel during first appeal as of right). Here, counsel faile to properly raise the issue of ineffective assistance of trial counsel on direct appea but attempted to correct his ommissions by filing a collateral habeas corpus petition only to abandon the defendant during the appeal period allotted for appealing from an adverse ruling.

After being improperly represented on his first right of appeal and being abandoned during the appeal period from the denial of his habeas corpus petition by counsel Craig

S. Cook, Mr Smith again sought relief in the district court below and was denied (See Attachment IV-VI hereto). This appeal now ensues.

The appellant has largely been without the [effective] assistance of counsel altogether. Nevertheless, to prevent any re-adjudication of claims that have already been "fully and fairly" reviewed on appeal and, to avoid any confusion on this appeal, perhaps it would be appropriate for this Court to direct the respondent/Appellee attorney generals office to clarify what issues have been previously presented (in Mr Smith's initial appeal Case No# 920141 by counsel and pro se, as well as, in Mr Smith's initial habeas corpus petition Case No# 93-0900217 3rd Dist. Ct.) and/or fully exhausted in order that appellant may now seek the relief in federal court that his first court-appointed attorney James L. Shumate erroneously informed him that he could undertake when he improperly induced Mr Smith to withdraw his original motion to withdraw his guilty plea!

SUMMARY OF THE ARGUMENTS

a). A Procedural Default Is Not Always Detrimental To Post Conviction Relief, Especia Where As Here, Appellant's Counsel Was Ineffective On Appeal, Further Failed To Perfect An Habeas Corpus Appeal; And, Where the Trial Court Dismissed And Denied Appellant's Motion For Correction of Sentence... on The Basis of a Statute of Limitations but nonethe-Less Reached The Merits of Petitioner's Motion.

b). IT WAS Incorrect For The Trial Court To Summarily Deny Mr. Smith's Motion For Correction of A Sentence Imposed In An Illega Manner/ Motion To Withdraw Guilty Plea or The Erroneous Assumption That The Defendant Was Trying To Keep His Case Alive Indefinitely When The Record Conclusively shows That Mr. Smith Has Been Largely Without Counsel prior to and at the Time He Entered His Plea, As well as, on Appeal. And Further, That The Defendant Was Not Informed of The Consequences of His Pleas And/or The possible punishments That Could Be Imposed.

ARGUMENT

"... [I]t has long been our law, that a procedural default is not always determinative of a collateral attack on a conviction where it is alleged that the trial was not conducted within the bounds of basic fairness or in harmony with constitutional standards." Hurst v. Cook, 777 Pad 1029 (Utah 1989). See Also Earle v. Warden of Utah State Prison, 811 Pad 180 (Utah 1991).

The trial court below in determining Mr Smiths latest motion erroneously determined that Smiths claims were procedurally barred on the basis of a statute of limitations (Id at pg 2 Memorandum Decision Attachment IV hereto); b) that Smiths grounds for relief had been fully and fairly adjudicated on appeal or in a prior habeas corpus proceeding Id at pg 4 Attachment IV).

As a preliminary matter however, the lower court did not conclusively rely

upon either procedural default, and in fact, ruled on the merits (or lack thereof) of the defendant's claims. Specifically, the lower court held:

"... this court now finds that this motion is frivolous, repetitive and without merit. In addition, it is not supported by the records of the plea. (Attachment V hereto pg 4 thereof).

Appellant will address the question of the procedural default first.

The lower court apparently converted Mr Smith's Motion for Correction of Sentence... to a petition for post-conviction relief under the authority of Reay v. Utah Board of Pardons, 904 Pad 677, 681 (Utah 1996). and after reviewing the substance of appellant's claims dismissed his cause of action pursuant to Rule 65 B (5) and U.C.A. 78-35a 107 (see Attachment IV & V hereto).

The standard of review is settled.

In reviewing an appeal from the dismissal of a petition for a writ of habeas corpus, the appeals court does not defer to the trial court's conclusions of law that underlie the dismissal but, reviews those for correctness. Kelbach v. McCotter, 872 Pad 1033 (Utah 1994) see also State v. Pena (supra).

Mr. Smith was convicted in November 1988. At the time of Mr Smiths conviction the statute of limitations governing Smith's claims (and habeas corpus actions) was U.C.A. 78.12-31.1. This statute of limitations was declared unconstitutional by this very Court in Sept. 1993 in McClellan v. Holden, 222 Utah Adv. Rep 35. Therefore, at the time the alleged constitutional violations accrued in the instant case no statute of limitations was constitutionally enforceable. Compare Renn v. Utah State Board of Pardons, 222 Utah Adv. 57.

Niether Utah's new statute of limitations under 78-35a-107 nor the provisions barring actions as set forth under 78-35a-106 (1996) may be applied to the instant case as both of these provisions were enacted post/after the constitutional violations alleged by Mr Smith. They may not be applied retroactively because they fail to "explicitly" declare themselves retroactive as required under U.C.A 68-3-3 and the petitioner was not provided notice of the new time constraints.

Admittedly this section governing statut of limitations for post-conviction relief does contain a statute referencing that a petitioner may bring a new claim based upo a new interpretation or "retroactive" applic. tion or change in the law" but it clearly does not declare its self retroacti to claims occurring prior to its enactment

Because this new statute limits a defendant's constitutional right to petition for writ of habeas corpus and extinguishe that constitutional guarantee after one yea

The new statute (and/or amendment thereof) is substantive, not procedural and may not apply retroactively. See Smith v. Cook, 803 P2d 788, 792 (Utah 1990) ("A statute is considered procedural or remedial, as opposed to substantive, [only] if the statute does not enlarge, eliminate, or destroy vested rights.")

On the other hand however, even if assuming that 78-35a-107 and/or 78-35a-106 did apply retroactively to the appellant's cause of action, Mr. Smiths petition below was timely. 78-35a-106 & 107 were not enacted until 1996. Mr Smith filed this current action on May 15 1996, clearly within one year of the enactment of this new provision.

An additional reason that the trial courts decision below is incorrect is that any time bar or statute of limitations that may apply to Mr Smith's claims was tolled on the basis that Mr Smith is suffering a "continuing wrong" wherin

the injury and/or results of the injury herein are still occurring. See generally Stuebig v. Hammel, 446 F. Supp. 31 (M.D. Pa 1977) Dissenting Opinion in McClellan v. Holden, 222 Utah Adv. Rep 35 (Ut. App. Sept. 17, 1993).

B.

The Trial Court Incorrectly Denied Mr. Smith Relief By Erroneously Determin The Absence of Unusual Circumstances And/ Cause For Procedural Fault.

In Wells v. Shulsen, 747 Pad 1043 (Utah 1987) the Utah Supreme Court found that:

"Under both federal and state laws, a petitioner in a habeas corpus proceeding must show cause for a procedural default and the resulting prejudice he suffered." (internal citations ommitted).

As set forth supra, the cause for the procedural default is attributable to the State. Specifically, to State court appointed appellate counsel's failure to properly perfect the defendant's appeal and that counsel's attempt to substitute a habeas corpus petition (Case No# 93-0900217) for regular appellate review.

As set forth in Attachment III The Utah State Supreme Court held

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"The issue that appellate counsel urges us to address for the first time on appeal is whether the trial court erred in entering a twenty-year recommendation of incarceration with respect to Smith's prison sentence. Counsel asserts that there was no factual record before the trial court justifying that recommendation. We refuse to address the issue ....

It is black-letter law that an appellate court will not address issues raised for the first time on appeal...

however, the district court may address the issues ... in Smith's pending petition for a writ of habeas corpus [filed by the same counsel]." Id. Other issues not raised by this same state-court-appointed counsel on direct appeal but presented in the petition for writ of habeas corpus dealt with Mr Smith's claim of ineffective assistance of trial counsel as well as the facts associated with not being informed of the consequences of his plea and/or of the possible punishments that may be imposed.

Not only did this state-court appointed appellate counsel fail to properly perfect Mr Smith's direct appeal but moreover, failed to perfect an appeal from the denial of the habeas corpus petition.

The Due Process Clause requires effective assistance of counsel during the defendant's appeal as of right. Evitts v. Lucey (supra). "Counsel's failure to [properly] perfect Mr Smith direct appeal is an 'obvious injustice'

(citing Wagstaff v. Barnes, 802 Fed at 774) which is sufficient to excuse any procedural default. Wells supra, Murray v. Carrier, 477 U.S. 478; Chess v. Smith, 617 Fed at 344.

Mr Smith was not attempting to "...frustrate the ends of justice by trying to keep his case alive indefinitely" (Memorandum Decision pg 4 thereof Attachment IV hereto). To the contrary, Mr Smith has merely been attempting to fully and fairly adjudicate his claims. Claims that were not properly presented by appellate counsel. In short, Mr. Smith is merely seeking that which he is lawfully entitled — His day in Court.

II.

It Was An Abuse of The Trial Courts Discretion To Determine That The Defendant Has No Right To Be Informed Of The Consequences of His Plea And/or

of The Possible Punishments That Could Be Imposed.

According to Rule 3.6 of the Rules of Practice of the District Court (1988) upon entry of a plea of guilty to a criminal charge, before acceptance there there must be substantial compliance wit the following:

(a) The court shall not accept a plea of guilty without first making certain that the defendant understands the following: ... (2) the minimum and maximum sentence prescribed by law ... that may be imposed.

In otherwords, the "consequences of his plea and the possible punishments that may be imposed." Numerous cases

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3. See also Rule 11 of the Utah Rules of Criminal Procedure

hold that matters affecting the sentence of a defendant allow withdrawal of a guilty plea if the elements, facts, circumstances and/or consequences of the plea are not fully explained. State v. Smith, 776 P2d 929 (Utah 1989); State v. Copeland, 765 P2d 1266 (Utah 1988); State v. West, 765 P2d 891 (Utah 1988); State v. Vasilacopulous, 756 P2d 92 (Utah App 1988); State v. Gibbons, 740 P2d 1309 (Utah 1987).

Because the lower court ecroneously determined that Smith's claims were "fully" and "fairly" adjudicated in a prior direct appeal [Case No# 920141] or habeas corpus proceeding [Case No# 93-0900217] and the record reflects that defendant's state-court-appointed attorney [Craig S. Cook] failed to properly perfect the direct appeal [from the denial of Mr. Smith's Motion for Leave To Withdraw Guilty Plea] and further, failed to appeal from the denial of an adverse ruling against Mr. Smith's Habeas Corpus

Petition; which, presented issues Cook should have presented in Smith's direct appeal, it was incorrect for the trial court to apply a procedural default to Smith's claims under the basis of res-judicata because, the record fails to support that Smith's claims were in fact previously "fully" and "fairly" adjudicated. Hurst (supra).

Therefore, this court should now review the substance of Smith's claims. Specifically, whether the trial court abused its discretion in determining Smith's claims were "frivolous," "repetitive" and "without merit." Attachment V hereto.

Accordingly, "The law places the burden of establishing compliance with the requirements for taking a guilty plea by using a written affidavit on the trial judge. It is not sufficient to assume that defense attorneys make sure that their clien fully understand the contents of the affidavit." Gibbons, (supra).

"The absence of a finding under this section ... is critical [if] the record as a whole ... fails to 'affirmatively' establish that the defendant entered his plea with "full" knowledge and understanding of its consequences." State v. Miller, 718 Pad 403 (Utah 1986).

Because of the importance of compliance with Rule 11, the law places the burden of establishing compliance with those requirements on the trial court. Gibbons, at 1313.

In the instant case, this is something that the trial court cannot do.

The strict compliance analysis is based on whether the plea affidavit and the colloquy with the court, taken together, demonstrate strict Rule 11 compliance. State v. Smith, 812 Pad at 477.

Niether Smith's plea affidavit (appended hereto as Attachment VII) nor the colloquy between the court and the defendant

support that the defendant was ever advised of the consequenses of his plea (i.e. the 20 year minimum sentencing recommendation made by the court).

The lower court recently held that:

> With respect to defendant's claim that this Court failed to properly advise [the defendant of the possible consequences of his plea and/or the possible punishments which may be imposed] according to U.R.Cr.P. 11 (g) (2), this Court finds that this rule provides the following:
>
> If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

This Court agrees that, in accordance with the decision State v. Gibbons, 740 P2d 1309 (Utah 1987), courts are required to strictly comply with the provisions of Rule 11, and that the purpose behind this rule

is to ensure defendants are guaranteed their constitutional rights."

The court goes on to state:

"However, this Court would also point out that the provision at issue affords protection only if sentencing recommendations are allowed by the court. In the case at hand, the Defendant was charged with a capital offense, the criminal penalties for which are statutorily designated as either the death penalty or life imprisonment. U.C.A. §76-3-207 (4), (6) (1996). In addition, the parties had entered into a conditional plea agreement which expressly provided that Defendant would be sentenced to life imprisonment rather than face the potentiality of a death sentence in a trial by jury. Therefore, according to the statute, and the plea arrangement agreed to by the parties [and the Court], the term of Defendant's sentence was not an issue at the time of sentencing." (Attachment IV pg 4).

The crux of the matter however, is that the trial court put the matter into

issue after having participated in the plea negotiations and/or agreeing to a tentative plea bargain then ambushing the defendant with a 20 year minimum sentencing recommendation.

A review of the sentencing transcript reveals that both counsel for the State and Smith's defense counsel recommended a life sentence:

> THE COURT: I'd like the record to reflect that prior to taking the bench here in the open courtroom, all counsel and I discussed this proposed plea bargain -- including Mr. Chamberlain -- so that everyone was aware of what the proposal was about before I took the bench. (Sentencing Transcript pg 19 ll 17-22 Attach. I hereto).

> THE COURT: ... Again, if you plead guilty under the conditions of this agreement, this would entail a conditional plea, meaning that you would plead guilty upon basically a commitment by the Court that a life sentence would be

imposed as opposed to death.

Do you understand that?

MR. SMITH: Yes sir.

THE COURT: All right. Do you have any questions about the nature of the charges against you or the possible penalties?

MR SMITH: No, sir. Id pg 8 ll 8-21

THE COURT: ... Does either counsel wish to present anything before I impose sentence? Id pg 21 ll 14-15

MR KANELL: The State requests the Court to sentence the defendant to life in prison. Id pg 22 ll 10-11.

The court did not advise the defendant that these sentencing recommendations were not binding on the court.

The court then went on to sentence the defendant as follows:

THE COURT: All right. Tracy Eugene Smith, having been convicted by your own plea of the offense of murder in the first-degree, a capital offense, ... I now sentence you to the Utah State Prison for the rest of your "natural" life.

Im also going to make a recommendation to the board of pardons, which I would like included in the order, that Mr. Smith serve 20 years before hes considered to be released... Id pg 22 ll 14-23.

It should be noted that when the Judge, "and all counsel" were discussing the proposed plea bargain (referenced above) They were discussing it in the defendant's absence!

Nevertheless, the lower court in an attempt to justify its failure to properly advise the defendant of the consequences of his plea or the possible punishments that

could be imposed, circumvents the fact that the court failed to admonish the defendant that the "life" sentencing recommendations of both defense counsel and the state were not binding upon the court but could be supplemented to the effect of a 20 year minimum recommendation. Instead of addressing the Court's abuse of discretion the court states:

> At the time the Defendant entered his plea, this Court asked counsel if they had any recommendations regarding sentencing. This question, taken out of context, may be what confused the Defendant[4] and led him to believe that some violation of his Rule 11 rights were violated. However, when taken in context, the question was asked and responded to in light

4. More likely than not, what "confused" the defendant was the Court's 20 year minimum sentencing recommendation that was not disclosed prior to the entrance of defendants plea.

of Defendant's right to delay the imposition of sentencing for a period of thirty days . . . . (Attachment IV, pg 3 thereof)

This finding completely ignores counsels' life sentencing recommendations and is a factual distortion which disregards the sentencing recommendations and is itself out of context not to mention outside the scope and spirit of the plea arrangement. In sum, it is an obvious reversiable error. Generally State v. Kay, 717 Pad. 1294 (Utah 1986).[5]

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5. The lower court has recently concluded that a life sentence (such as the one defendant is serving) is a Indeterminate Sentence under Utah Law. Accordingly, appellant submits that the trial court's conclusion if correct, conclusively establishes that the trial court's 20 year minimum sentencing recommendation which was undisclosed to appellant prior to the entry of his plea was prejudicial as it directly impacts his indeterminate sentence or actual length of confinement and de facto

III.

The Trial Court Erroneously Determined That Mr Smith Failed To Establish That His Original State Court Appointed Attorney Was Ineffective.

There are essentially two exclusive claims of ineffective assistance of counsel presented by appellant: a) That counsel was rendered ineffective at sentencing by the trial court and b) that counsel was generally ineffective at sentencing and at the time that Mr. Smith entered his plea by rendering deficient performance.

Appellant asserts that the trial-court erred in determining that counsel was not deficient and further erred in applying the two-prong test articulated in Strickland v. Washington, 466 U.S. 668 (1987) to both aspects of Smith's ineffective assistance of counsel claims.

First, when the court entered the 20

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becomes a consequence in which he was not informed at the time he entered his plea. Attach. VI

year minimum sentencing recommendation defense counsel was taken in total surprise because such a recommendation was not disclosed by the court (or any of the other attorneys) during the out-of-court, off the record discussion of the proposed plea bargain. (See pg 31 supra). Because the trial court failed to disclose such a sentencing condition until after the plea was entered and not until the time of actual sentencing, The court "prevented [counsel] from assisting the accused during a critical stage of the proceeding."[6]

In this context, Utah Courts have:

> uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. Wagstaff v. Barnes, 802 P2d. at 774. (emp. added).

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6. Sentencing is a Critical Stage of the Criminal Proceedings where defendants are entitled to effective assistance of Counsel, State v. Cazarez, 656 P2d 1005, 1007 (Utah 1982)

Likewise, the United States Supreme Court has also identified a narrow category of cases in which "prejudice is presumed." In emphasis, where the acts of the prosecution and/or trial court result in an actual or constructive denial of the assistance of counsel. U.S. v. Cronic, 466 U.S. 648 at 692 (1982). In regard to this aspect of Smith's ineffective assistance of counsel claim the trial court erred in applying the two-prong test for ineffective assistance of counsel articulated in Strickland (supra) and instead, should have reviewed the matter in light of whether the court caused a constructive denial of the assistance of counsel by recommending a 20 year minimum sentencing recommendation; Simply because, there is no way counsel could have fully informed his client that the court could add a minimum sentencing recommendation if the court failed to disclose this fact prior to accepting the plea.

IV.

The Court Also Erred In Determining That

The Defendant Failed To Establish That His Counsel Rendered A Deficient Performance

The lower court held:

> With respect to Defendant's claim that he received ineffective assistance of counsel at the time he entered his plea [and/or at sentencing] ... this Court would add that, in order to establish that he was poorly represented, the Defendant must satisfy a two-prong test:
>
> First, a petitioner must show "that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment." ... Second, a petition[er] must show that his counsel's performance prejudiced him. (citations ommitted).
>
> ... This requires the Defendant to demonstrate specific instances where counsel acted or failed to act in a manner which does not meet an objective standard of reasonableness. (emp added).

In the present case, defense counsel addressed the Court with regard to the weaknesses in the State's case against the Defendant. At that time, defense counsel stated that, in light of the fact that Defendant's co-defendant was involved in a criminal case arising out of the same incident, and that testimony might be elicited in that case which would implicate the Defendant in a robbery offense, it was advisable for the Defendant to accept the terms of the plea. ...[Considering] the co-defendant's criminal case and the possibility that Defendant faced a death sentence if his case resulted in a jury trial, it is the opinion of this Court that defense counsel's advice that Defendant sign the plea agreement had a reasonable basis which does not reflect ineffective assistance of counsel. Id. Attachment IV hereto.

First, the Court fails to recognize that Mr. Smith (at the time of the entrance of his plea) still faced that very same

"death sentence" that the court know attempts to use as a justification for the entrance of the plea. In emphasis, the count represents that the plea was entered to avoid the possibility of the imposition of the death penalty. The record establishes otherwise:

THE COURT: Thank you. If this offense is admitted by you, it could be punishable by death [sic], or it could be punishable by life imprisonment. T.T. pg 8 ll 1-3; see also TT pg 8 ll 13-15; Attach I.

MR. KANELL: Your Honor, pursuant to the plea agreement, the state does not have any evidence of aggravating circumstances to present, and the State does not request the Court to sentence the defendant to the death sentence (emp added) TT pg 22 ll 2-6

THE COURT: Does not request that?,

MR KANELL: Does not request that. Id.

In short, Mr Smith faced the same hazard of entering a guilty plea as he would have faced had he exercised his constitutional right to a fair jury trial. I.e. CAPITAL PUNISHMENT!

Further, and realistically speaking, what other position could defense counsel take considering that he possessed no previous trial experience [whatsoever] and additionally failed to conduct any pre-plea investigation.[7]

a. Mr. Shumate filed no motions on appellant's behalf;

b. Mr. Shumate performed no investigation, and did not have an investigator appointed to assist in the defense of Smith's case.

c. Mr. Shumate was the sole counsel for the defendant and this was a Capital Homicide case.

d. Mr. Shumate failed to advise the Defendant of the possible 20 year minimum sentencing recommendation subsequently imposed by the Court.

e. Mr Shumate waived/ignored a pre-sentence report when such "strategy" foreclosed any chance of a more lenient sentence and/or

---

7. of course that counsel under such circumstances is going to advise his client to enter the plea agreement

sentencing recommendation.

f. Mr. Shumate had only two brief meetings with appellant prior to the entrance of the guilty plea. See Case No# 93-0900217.

g. There was insufficient time to perform an adequate investigation prior to the plea/sentencing. (supra at pg 4).

In short, the record supports Smiths claims of ineffective assistance of counsel. Compare U.C.A. 77-32-301 (1) (A defendants attorney is required to provide counsel whenever the attorney's client faces a substantial probability of the deprivation of his liberty; That counsel is required to provide investigatory and other facilities necessary <u>for a complete defense</u>, 77-32-301 (3); not merely a defense geared toward plea negotiations; That counsel is required to assure undivided loyalty to the client, 77-32-301 (4); And, that counsel is required to counsel and defend their client at every stage of the criminal proceedings, 77-32-304 (1) (a)). Mr Smith was denied effective assistance of counsel.

The trial court submits that defense counsel's actions were reasonable on the basis that there may or had been a reasonable basis for the plea (supra at pg 40).

Nevertheless, appellant submits that counsel's actions were unreasonable because there was a reasonable basis for a conviction for 2nd Degree Murder as opposed to Capital Homicide and counsel failed to investigate or prepare this line of defense. At the very least, the possibility of the imposition of the death penalty was marginal at best. Essentially the plea "bargain" offerred no real benefit to the defendant. [See State v. Copeland 765 Pad 1266, 74-76 (Utah 1988).

The state's case was: 1. "relatively weak as per their own admission (T.T. pg 17 ll 13-25 2. There was an absence of aggravating factors; 3. A question of reliability on part of the co-defendant. 4. The age of the defendant and 5, The exculpatory/mitigating statement of the defendant himself (See TT. at pg 15, ll. 14-21 Attach. I hereto).

There is one other legal reason why the trial court's determination that Mr. Smith failed to establish that his counsel's performance was deficient in some demonstrable manner is in err.

In determining Mr. Smith's ineffective assistance of counsel claim, the trial court failed to apply the Utah State Supreme Court's new rule (which requires any attorney appointed in a capital case to have a certain minimum level of experience) as articulated in State v. Holland, P2d (Ut Jan 1994), to Smith's claims.

Because Smith's case was at bar pending before the 3rd District Court and presenting a claim of ineffective assistance of counsel at the time State v. Holland (supra) was decided, "considerations of judicial integrity require [the court] to extend the benefit of [that] decision to [Smith] and any other [defendant] who currently [had] a claim pending in the district or on appeal before this court or the court

of appeals challenging [ineffective assistance of counsel in capital homicide cases]. Labrum v. Utah State Board of Pardons, 870 Pad 902 (Utah 1993); State v. Holland, Pad (Ut. Jan 1994)

Because the trial court failed to apply this standard to the determinatho of Smiths ineffective assistance of counsel claim its determination was incorrect.

Conclusion

The trial court improperly applied a procedural default to Smiths claims. likewise, the trial court incorrectly applie. the statute of limitations to Smiths claims Further, the court erred in not applying the standard for attorneys (articulated by the Ut. State Supreme Court in Holland supra) for capital cases to Smiths claim

Finally, the court clearly abused its discretion in denying Mr Smiths motion for correction of sentence imposed in an illegal manner / motion to withdraw guilty plea. and by ambushing the de-

fendant with a 20 year minimum sentencing recommendation —— In otherwords, by failing to inform the defendant of the consequences of his plea and/or of the possible punishments that may be imposed.

Relief Sought

Mr. Smith requests this Court to reverse & remand this matter for the trial court to determine if Smith would have entered the plea in question if he had been fully advised of the consequences of his plea by either the Court or defense counsel. Mr Smith further requests that this Court direct the lower court to enter a determination as to whether or not Mr. Smith would have entered the plea had he been informed by counsel of the possibility of a 2nd Degree Murder defense.

Mr Smith also asks this court to reverse and remand this matter and to further direct the trial court to apply the standard governing the minimum level of experience for counsel in capital cases

Certificate of Service

I hereby certify that I caused two true and correct copys of the foregoing Brief of Appellant with Attachments to be served upon the below listed person by placing said copies in the U.S. mail postage pre-paid and addressed to:

Mr. James H. Beadles Esq.,
Asst. Attorney General, Utah
Office of the Attorney General
P.O. Box 140856
160 E 300 S.
S.L.C., Ut. 84114-0856

On this 16 day of March, 1998.

Tracy E. Smith

TRACY EUGENE SMITH.

articulated in Holland (supra) to Smith's ineffective assistance of counsel claims.

Mr. Smith asks for any other relief deemed appropriate by this Court which is not prejudicial to the defenda

Submitted in good faith this 16 day of March, 1998.

Tracy E Smith

TRACY E. SMITH
W/O Counsel.

ADDENDUM

agreement that has been stated on the record, whereby Mr. Smith would plead to first-degree murder as outlined on the record.

I telephoned Rowena Hoskins, reviewed that with her, and she has given me authority to indicate to the Court that she is in agreement with that plea bargain and is satisfied that -- on behalf of her and the family members -- that she has told me she represents -- that the -- that being the wife of Mr. Bray, another sister, and a child of Mr. Bray -- that they are satisfied with a plea of guilty to this offense and a commitment of a life sentence -- that they are satisfied.

THE COURT: All right. Thank you, Mr. Chamberlain.

MR. CHAMBERLAIN: Thank you.

THE COURT: I'd like the record to reflect that prior to taking the bench here in the open courtroom, all counsel and I discussed this proposed plea bargain -- including Mr. Chamberlain -- so that everyone was aware of what the proposal was about before I took the bench.

Well, based upon the representations made, I'm going to find that there is a factual basis upon which the plea may be rested. And I'm going to also

ATTACHMENT I

BEAVER, UTAH: MONDAY, NOVEMBER 14, 1988

-oOo-

THE COURT: We're back in session. It's 20 minutes to 2:00.

I'll first call Criminal No. 631, State of Utah versus Tracy Eugene Smith.

MR. SHUMATE: They are just removing the handcuffs on Mr. Smith, Your Honor, so that he can have the hands in front of him so he can sign this item.

If I could approach the bench, Your Honor, I can give Your Honor a copy of this. We'll keep the original while we execute it.

THE COURT: All right. Thank you.

The record should reflect that Mr. Smith is now present with his counsel Mr. Shumate.

This matter comes on at your request. Did you want to tell the Court what we're doing?

MR. SHUMATE: Yes, Your Honor. This matter is before the Court for the arraignment before Your Honor and the entry of a plea pursuant to a plea bargain agreement entered into between the defendant, myself, and the State of Utah, represented by Mr. Kanell.

The defendant is presently charged with first-degree murder, a capital offense. The plea

agreement contemplates a plea of guilty to be entered to that offense on a conditional basis. That is, that if the Court were to impose the sentence of death, that the conditional plea could be withdrawn. If the Court were to impose the sentence of life imprisonment, then the plea would stand.

Mr. Smith and I have discussed the matter in substantial detail. The case has been through a preliminary hearing and, of course, was bound over for arraignment today. The Statement of Defendant Regarding Plea Bargain and certificates of counsel have been prepared. Mr. Smith has read it; has initialed it. He has not yet signed it but intends to sign it here in open court before Your Honor.

THE COURT: All right.

Is your full, true, and correct name Tracy Eugene Smith?

MR. SMITH: Yes, sir.

THE COURT: All right. And how old are you, Mr. Smith?

MR. SMITH: 21.

THE COURT: And do you read and write English?

MR. SMITH: Yes, sir.

THE COURT: Have you read the Information which has been filed in this case against you?

MR. SMITH: Yes, sir.

THE COURT: All right. I'm going to go through that Information with you. It's relatively short. I'm going to read it to you now.

State of Utah versus Tracy Eugene Smith. Date of birth, March 16, 1967.

MR. SMITH: 17th.

THE COURT: March 17, 1967. I'll make that amendment.

Information in Circuit Court No. 88-CR-11, District Court No. 631.

The undersigned under oath states on information and belief that the above-named defendant, Tracy Eugene Smith, committed the following criminal offense, to wit: Murder in the first-degree, a capital offense, in violation of Section 76-5-201 and 76-5-202 (1) (d), Utah Code Annotated as amended 1953, in that on or about the 3rd day of October, 1988, within Beaver County, State of Utah, the said defendant intentionally or knowingly caused the death of James Glen Bray under the following circumstances.

"The homicide was committed while the actor was engaged in the commission of or an attempt to commit an aggravated robbery or robbery." In addition, a firearm was used in the commission or in furtherance

of the felony.

This Information was based on evidence obtained from Raymond Goodwin and Sheriff Kenneth Yardley. Signed by Leo G. Kanell, Beaver County Attorney. Authorize by presentment and filing by Mr. Kanell and subscribed and sworn to by me on the 6th day of October, 1988.

Do you understand the Information, Mr. Smith?

MR. SMITH: Yes, sir.

THE COURT: All right. You have the right in this matter to be represented by an attorney. And you are represented by Mr. Shumate standing there beside you; is that correct?

MR. SMITH: Yes, sir.

THE COURT: And have you had an opportunity to consult with him to your satisfaction?

MR. SMITH: Yes, sir.

THE COURT: Okay. You also have the right to require the State to prove each and every element of this offense beyond a reasonable doubt at a trial either before the Court or before a jury.

The elements of the offense which the State would have to prove and which you would be admitting if you plead guilty in this matter are

these: That on or about the 3rd day of October, 1988, within this county and state, you intentionally or knowingly caused the death of James Glen Bray while engaged in the commission of or attempt to commit aggravated robbery or robbery.

Do you understand those elements?

MR. SMITH: Yes, sir.

THE COURT: Now, as I understand the law -- and correct me if I'm wrong -- the firearms enhancement does not apply in a capital case.

Is that correct? There is no firearms enhancement?

MR. KANELL: I'm not aware of any enhancement under that section.

THE COURT: Is that correct?

MR. SHUMATE: The Court is correct, Your Honor.

THE COURT: So I won't explain the firearms enhancement.

Do you understand all those elements that I just went over?

MR. SMITH: Yes, sir.

THE COURT: If you admit those elements by pleading guilty to this offense, then the State doesn't have to prove them at all. You'll stand convicted by your own statement.

Do you understand that?

MR. SMITH: Yes, sir.

THE COURT: All right. If you decided to go forward with the trial, you would have the right at the trial to confront and cross-examine the witnesses against you, meaning you would have the right to hear them testify and ask them questions through your legal counsel. You would have the right not to testify or give evidence against yourself, meaning nobody could call you as a witness; nobody could make you make a statement. And, of course, if you plead guilty, you'll make a statement which is the ultimate evidence against you. You would have also the right to present any evidence you wish to in that trial or to testify if you chose to testify.

Do you understand all those rights?

MR. SMITH: Yes, sir.

THE COURT: Okay. If you plead guilty, you waive all those rights. The trial -- the trial will not take place, and you won't have those opportunities and those rights I just explained.

Do you understand that?

MR. SMITH: Uh-huh.

THE COURT: You have to answer out loud.

MR. SMITH: Yes, sir.

THE COURT: Thank you. If this offense is admitted by you, it could be punishable by death, or it could be punishable by life imprisonment.

Normally a trier -- a jury would determine those -- the sentence. You would have a right to have a jury determine which of those sentences would be imposed if you were convicted of the offense.

Again, if you plead guilty under the conditions of this agreement, this would entail a conditional plea, meaning that you would plead guilty upon basically a commitment by the Court that a life sentence would be the punishment that would be imposed as opposed to death. And if the Court, in fact, pronounced the death sentence, you would have the right to withdraw your plea.

Do you understand that?

MR. SMITH: Yes, sir.

THE COURT: All right. Do you have any questions about the nature of the charges against you or the possible penalties?

MR. SMITH: No, sir.

THE COURT: Okay. Do you have any questions about the fact that the State has the burden of proving these charges?

MR. SMITH: No, sir.

THE COURT: Okay. Do you have any questions at all about anything we've discussed to this point?

MR. SMITH: No, sir.

THE COURT: All right. Has anyone brought any force or fear or threat to bear against you to cause you to enter into this agreement?

MR. SMITH: No, sir.

THE COURT: All right. Are you acting freely and voluntarily?

MR. SMITH: Yes, sir.

THE COURT: Are you under the influence of alcohol or --

MR. SMITH: No, sir.

THE COURT: -- drugs?

MR. SMITH: No, sir.

THE COURT: Mental or physical illness?

MR. SMITH: No, sir.

THE COURT: So you feel like there's nothing impairing your ability to make a decision today?

MR. SMITH: No, sir.

THE COURT: Okay. Have you reviewed this Statement of Defendant Regarding Plea Bargain?

MR. SMITH: Yes, sir.

THE COURT: Are these your initials that appear by each paragraph?

MR. SMITH: Yes.

THE COURT: Have you signed the document?

MR. SHUMATE: He has not, Your Honor. We intend to sign the document at this point.

THE COURT: All right. Mr. Smith, having in mind all that we've talked about today -- the possible penalties -- and I should tell you that if you plead guilty under these circumstances, I most likely -- most definitely will sentence you to serve the rest of your life in the Utah State Prison -- having that in mind, is it your desire to enter into this plea agreement?

MR. SMITH: Yes, sir.

THE COURT: All right. If that's your desire, sign the agreement.

(Whereupon the agreement was signed.)

THE COURT: The record should reflect that the defendant has, in fact, affixed his signature in the presence of the Court.

I note in reading Paragraph 10 of the agreement, that it was also part of the plea agreement, that the State agreed not to request the death penalty and not to present any aggravating evidence at a hearing before the Court.

Is that correct?

MR. KANELL: That's correct, Your Honor.

THE COURT: Is that part of your agreement, Mr. Shumate?

MR. SHUMATE: It is, Your Honor.

THE COURT: And you understand that, Mr. Smith?

MR. SMITH: Yes, sir.

THE COURT: All right. Now, have we stated the entire agreement as you understand it, Mr. Smith?

MR. SMITH: Yes, sir.

THE COURT: I find that the defendant is acting freely and voluntarily. He appears to be alert and responsive to the questioning of the Court. He appears to know what he's doing and what this plea agreement is about.

Do you agree, Mr. Shumate?

MR. SHUMATE: Yes, Your Honor.

THE COURT: Do you agree, Mr. Smith?

MR. SMITH: Yes, sir.

MR. SHUMATE: Your Honor, perhaps we could make a brief record on that.

Tracy, your family has also been here this morning; is that correct?

MR. SMITH: Yes, sir.

MR. SHUMATE: And you've had an opportunity to visit with your mother, your grandmother, your aunt, and your sister; is that correct?

MR. SMITH: Yes, sir.

MR. SHUMATE: And they are here in the courtroom at this time? Is that also correct?

MR. SMITH: Yes.

MR. SHUMATE: And it's after discussing the matter with them and with me and with all of us together, that you have determined to enter into this decision; is that correct?

MR. SMITH: Yes, sir.

MR. SHUMATE: Thank you.

THE COURT: Do you have any questions at all, Mr. Smith, about anything that is contained in this Statement of Defendant Regarding Plea Bargain?

MR. SMITH: No, sir.

THE COURT: Do you feel you understand your rights in this matter?

MR. SMITH: Yes, sir.

THE COURT: Have I presented an adequate record, Mr. Shumate? Anything you can think of I need to do?

MR. SHUMATE: Yes. I think the Court has.

THE COURT: Mr. Kanell?

MR. KANELL: Yes, Your Honor. I think that's fine.

THE COURT: All right. Are you ready now to enter your plea, then, to the charge of murder in the

first-degree, Mr. Smith?

MR. SMITH: Yes, sir.

THE COURT: What is your plea?

MR. SMITH: Guilty.

THE COURT: What is the factual basis?

MR. KANELL: Your Honor, the State's case is that the defendant, Mr. Smith, and another companion that he had picked up hitchhiking were traveling along I-15 in a stolen vehicle.

As they came into Beaver County, they had previously used up their last money for gas for the vehicle, and they stopped at a rest station north of town there looking for someone to rob; that a truck driver by the name of James -- excuse me.

THE COURT: James Glen Bray.

MR. KANELL: James Glen Bray had stopped at the rest stop there to -- he had made a phone call. He went into the rest room. That the truck driver was observed coming into the rest room by a witness who was in the rest room. He left -- as he was leaving the rest room, he observed a black male enter the rest room. And as he was -- this witness was outside with his girlfriend, he was -- in a short time, he heard a loud banging sound. He was not sure what it was, but the black man then came out of the rest room, walking

briskly, got into a car in the passenger's seat of the car, and that car drove away. This occurred shortly after 8:00 o'clock at night.

It was dark. The car, as it left the rest area, kept its lights off until it got out onto the freeway, and then the lights were turned off, and the car sped off.

THE COURT: Turned on, you mean?

MR. KANELL: Turned on. That's correct, Your Honor.

The witness who was there -- and his girlfriend -- drove on and contacted the sheriff's department and gave a description of the vehicle and of the black man and the white man that they had observed.

The defendant and a co-defendant, Mr. Miller, were observed in the town of Salina and were stopped by officers there and questioned. The defendant produced a 9mm weapon, which he held on his person. That weapon was taken into evidence and was analyzed by the state crime lab by ballistics experts.

It was found that the bullet that killed Mr. Bray and the shell that was left in the rest room matched the bullet or shell that would have been shot by that weapon.

And that's basically the State's case, Your Honor.

THE COURT: All right. Mr. Smith, you've heard the prosecutor's statement as to what the State's case would show in his estimation. Let me just ask you a couple questions to determine whether or not there's a factual basis for this plea.

Did you, in fact, shoot James Glen Bray in the rest stop?

MR. SMITH: Yes, sir.

THE COURT: And in so doing, were you trying to rob him?

MR. SMITH: No, sir.

THE COURT: What was the reason that you shot him?

MR. SMITH: Do I have to -- do I have to?

THE COURT: Tell me what the reason was.

MR. SMITH: It was more or less -- really, to tell you the truth -- a racial argument.

THE COURT: A racial argument?

MR. SMITH: Uh-huh.

THE COURT: Mr. Shumate, do you agree that the State's evidence of the robbery would be as Mr. Kanell has stated it?

MR. SHUMATE: Your Honor, the State's evidence

regarding robbery will most likely come from the co-defendant, Timothy Michael Miller, in Criminal No. 630.

Mr. Miller was the individual driving the vehicle at the time. He has made statements implicating at least an intention to seek money at the rest areas by means of the gun.

Mr. Smith and I have discussed the potential hazards of taking those facts to trial, and he and I have both agreed that the resolution of the case as contemplated in the plea agreement is appropriate; that the hazard of taking the facts to trial and resting our case solely on Mr. Smith's testimony is such that the plea agreement is more advisable.

THE COURT: Is that right, Mr. Smith?

MR. SMITH: Yes, sir.

THE COURT: Do you understand what your attorney is saying?

MR. SMITH: Pretty much.

THE COURT: You understand that he's saying that even though you disagree with the evidence about robbery, that he feels and has so advised you that if your co-defendant testifies that you went there to rob somebody, that a jury might be swayed by that, and you

might receive even a more severe penalty -- a death penalty? Do you understand that?

MR. SMITH: Yes, sir.

THE COURT: And having that in mind, is it your desire to enter into a plea agreement, knowing that you're going to be sentenced to prison for the rest of your life?

MR. SMITH: Yes, sir.

THE COURT: Is that a satisfactory record, Mr. Kanell?

MR. KANELL: Yes, Your Honor.

THE COURT: Mr. Shumate?

MR. SHUMATE: Your Honor, perhaps the record should also reflect that the impetus for the plea agreement is a weakness in the State's evidence in terms that there was no evidence and is no evidence that any property or other thing of value was taken from the victim there at the rest area.

THE COURT: Is that correct, Mr. Kanell?

MR. KANELL: That is correct, Your Honor. That is a weakness in the State's case.

THE COURT: So, in fact, there was no actual robbery, and your evidence would be basically circumstantial as to what the intent of the defendant was?

MR. KANELL: That's correct, Your Honor. In fact, the Circuit Court bound over only on the issue of attempted robbery as an aggravated factor. And in the plea bargain, I believe it states under the factual basis, that it was an attempted robbery.

THE COURT: All right. Did you understand all that, Mr. Smith?

MR. SMITH: Yes, sir.

THE COURT: Do you have any questions about that?

MR. SMITH: No, sir.

THE COURT: All right. Mr. Chamberlain, do you want to make a record with regard to your concerns in this matter?

MR. CHAMBERLAIN: Yes, Your Honor. I'd like the record to show that I represent the family of the victim. I've been contacted by them. Specifically by Rowena Hoskins, who is the sister of James Glen Bray, the victim in this matter.

I've spent a considerable amount of time -- a considerable amount of time with the sheriff's office in reviewing records. I've discussed it with Mr. Kanell and Mr. Shumate. Because of their concern that justice be served, I have -- shortly before the lunch hour, I learned of the proposed plea

agreement that has been stated on the record, whereby Mr. Smith would plead to first-degree murder as outlined on the record.

I telephoned Rowena Hoskins, reviewed that with her, and she has given me authority to indicate to the Court that she is in agreement with that plea bargain and is satisfied that -- on behalf of her and the family members -- that she has told me she represents -- that the -- that being the wife of Mr. Bray, another sister, and a child of Mr. Bray -- that they are satisfied with a plea of guilty to this offense and a commitment of a life sentence -- that they are satisfied.

THE COURT: All right. Thank you, Mr. Chamberlain.

MR. CHAMBERLAIN: Thank you.

THE COURT: I'd like the record to reflect that prior to taking the bench here in the open courtroom, all counsel and I discussed this proposed plea bargain -- including Mr. Chamberlain -- so that everyone was aware of what the proposal was about before I took the bench.

Well, based upon the representations made, I'm going to find that there is a factual basis upon which the plea may be rested. And I'm going to also

ADDENDUM

find that this plea is governed by the provisions of the Alford decision -- Alford versus North Carolina. And I'm going to accept it on both of those bases, and I'm going to order the plea of guilty entered.

Recommendations regarding sentencing in the matter?

MR. SHUMATE: Your Honor, Mr. Smith would ask the Court to allow him to waive the statutory time and proceed with sentencing at this time rather than to order the preparation of a presentence report, in view of the nature of the plea and the circumstances of the facts before the Court.

I don't think that the Court sentencing alternatives are substantial at all, and we're prepared to go forward with that at this time.

THE COURT: All right. Does the State have any objection?

MR. KANELL: The State does not oppose that.

THE COURT: All right. Mr. Smith, just so you're clear on this, the law allows you two days before you're sentenced and up to 30 days for sentencing. And you have the right to take advantage of that delay if you wish.

Your counsel's indicated that you want to give up that right and be sentenced today; is that

are fully contained in this Statement and in the attached plea agreement or as supplemented on the record before the Court. There is reasonable cause to believe the evidence would support the conviction of the Defendant for the offense(s) for which the plea(s) are entered and acceptance of the plea(s) would serve the public interest.

DATED this 14th day of November, 1988.

LEO G. KANELL
Beaver County Attorney

ORDER

Based upon the facts set forth in the foregoing Statement of Defendant regarding Plea Bargain and the foregoing Certificates of Counsel, the Court finds the Defendant's plea of guilty is freely and voluntarily made, and it is so ordered that the Defendant's pleas of "guilty" to the charge(s) set forth in the foregoing Statement be accepted and entered.

The foregoing Statement of Defendant was signed before me this 14th day of November, 1988.

J. PHILIP EVES
District Court Judge

88cr49

right?

MR. SMITH: Yes, sir.

THE COURT: All right. You realize that and I've already told you that if I sentence you today, it's going to be to the state prison for the rest of your life.

Do you understand that?

MR. SMITH: Yes, sir.

THE COURT: And having that in mind, do you still wish to waive your right to a delay?

MR. SMITH: Yes, sir.

THE COURT: All right. The record will reflect that waiver.

Does either counsel wish to present anything before I impose sentence?

Mr. Shumate?

MR. SHUMATE: No, Your Honor.

THE COURT: Mr. Smith, do you wish to make a statement in your own behalf before I impose sentence?

MR. SMITH: I'm sorry for what happened. I wish, you know, if he could feel my apology. I know that it can't bring him back, but I didn't mean to do it.

THE COURT: Anything else?

MR. SMITH: That's it.

CERTIFICATE OF DEFENSE ATTORNEY

I certify that I am the attorney for TRACY EUGENE SMITH, the Defendant above-named, and I know the Defendant has read the Affidavit or that I have read it to the Defendant; I have discussed it with the Defendant and believe that the Defendant fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the Defendant's criminal conduct are correctly stated, and these, along with the other representations and declarations made by the Defendant in the foregoing Statement are, in all respects, accurate and true.

DATED this 14th day of November, 1988.

JAMES L. SHUMATE
Attorney for Defendant

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in its case against TRACY EUGENE SMITH, Defendant. I have reviewed the Statement of the Defendant and find that the declarations, including the elements of the offense of the charge(s) and the factual synopsis of the Defendant's criminal conduct which constitutes the offense(s) are true and correct. No improper inducements, threats, or coercions to encourage a plea have been offered to the Defendant. The plea negotiations

THE COURT: Mr. Kanell, anything?

MR. KANELL: Your Honor, pursuant to the plea agreement, the State does not have any evidence of aggravating circumstances to present, and the State does not request the Court to sentence the defendant to the death sentence.

THE COURT: Does not request that?

MR. KANELL: Does not request that.

THE COURT: All right.

MR. KANELL: The State requests the Court to sentence the defendant to life in prison.

THE COURT: Anything else?

MR. SHUMATE: I'll submit it, Your Honor.

THE COURT: All right. Tracy Eugene Smith, having been convicted by your own plea of the offense of murder in the first-degree, a capital offense, in violation of the laws of the State of Utah, I now sentence you to the Utah State Prison for the rest of your natural life.

I'm also going to make a recommendation to the board of pardons, which I would like included in the order, that Mr. Smith serve 20 years before he's considered to be released from the Utah State Prison.

Anything else?

MR. SHUMATE: No, Your Honor.

reduction of the charges for sentencing made or sought by either defense counsel or the prosecutor are not binding on the Court and may or may not be approved or followed by the Court.

JS 11. I am not now under the influence of either drugs or alcohol.

JS 12. I have read this Statement or I have had it read to me by my attorney and I have placed my initials beside each paragraph to indicated that I know and understand its contents. I am 21 years of age, have attended school through the 12 and I can read and understand the English Language. I have discussed its contents with my attorney and I ask the Court to accept my plea of guilty to the charges set forth above in this statement because I did, in fact,

(1) on the 3rd day of October, 1988, intentionally and knowlingly caused the death of JAMES GLEN BRAY, while engaged in the commission of an attempted, aggravated robbery;

(2) That I did so within Beaver County, State of Utah.

DATED this 14th day of November 1988.

Tracy Eugene Smith

TRACY EUGENE SMITH
Defendant

THE COURT: Mr. Kanell, will you prepare the commitment papers and the judgment?

MR. KANELL: Would you like -- would it be appropriate to indicate in the order that a firearm was used in the commission of the offense?

THE COURT: Well, there hasn't been a plea taken to that, but I think the factual basis, as we stated it, is clear.

Perhaps what I would prefer you do is obtain a copy of the transcript of today's proceedings, and you may attach that, if you wish, when we send it up to the board of pardons.

MR. KANELL: Okay. Thank you.

THE COURT: All right. Anything else to be taken care of?

MR. SHUMATE: No, Your Honor.

THE COURT: Thank you. Good luck, Mr. Smith.

I need to inform you of one other matter, Mr. Smith. You have the right to appeal the decisions of this Court today. That right to appeal begins to run today. If you want to appeal, you have to file notice of your intent to appeal with the clerk within 30 days of today's date. If you fail to do that, you lose your right to appeal.

Do you understand your right to appeal?

which I have been convicted or to which I have pleaded guilty, my plea in the present action may result in consecutive sentences being imposed on me.

JS 8. I know that the fact that I have entered a plea of guilty does not mean that the Court will not impose either a fine or sentence of imprisonment upon me and no promises have been made to me by anyone as to what the sentence will be if I plead guilty or that it will be made lighter because of my guilty plea.

JS 9. No one has forced or threatened or coerced me to obtain my plea of guilty and I am doing so of my own free will and after discussing it with my attorney. I know that any opinions he may have expressed to me as to what he believes the Court may do are not binding upon the Court.

JS 10. No promises of any kind have been made to induce me to plead guilty except that I have been told that if I do plead guilty, the State has agreed to not request the death penalty and to not present any aggravating evidence at the hearing before the court. I have also been informed that my plea of guilty to the offense of FIRST DEGREE MURDER, a capital offense, is conditional upon the court's imposition of a sentence of life imprisonment. I understand that should the court impose the death penalty, I may withdraw my plea of guilty and require the State of Utah to go forward with a trial in the matter. I am also aware that any charge or sentencing concessions or recommendations for probation or suspended sentences, including a

Alford Plea

MR. SMITH: Yes, sir.

THE COURT: All right. Good luck.

(Whereupon the proceedings in the above-entitled matter were concluded.)

JS 4. I know that under the Constitutions of Utah and of the United States I have a right against self-incrimination or a right not to give evidence against myself and that this means that I cannot be compelled to testify in Court upon trial unless I choose to do so.

JS 5. I know that under the Constitution of Utah, if I were tried and convicted by a jury or by the Court, I would have a right to appeal my conviction and sentence to either the Court of Appeals or the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, those costs would be paid by the State without cost to me and that I would have the right to have the assistance of counsel on such appeal.

JS 6. I know and understand that by entering a plea of guilty I am waiving my constitutional rights as set out in the five preceding paragraphs and that I am, in fact, fully incriminating myself by admitting that I am guilty of the crimes to which my plea of guilty is entered.

JS 7. I know that under the laws of Utah the maximum sentence that can and may be imposed upon my plea of guilty to the charges identified on page one of this affidavit is:

A. Death or life imprisonment.

and that the imprisonment may be for consecutive periods if my plea is to more than one charge. I also know that if I am on probation, parole or awaiting sentencing upon another offense of

C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

I, PAUL G. MCMULLIN, CSR, RPR, a Notary Public, in and for the County of Washington, State of Utah, do hereby certify:

That, the foregoing matter, to wit, STATE OF UTAH VS. TRACY EUGENE SMITH, CRIMINAL NO. 631, was taken down by me in shorthand at the time and place therein named and thereafter reduced to computerized transcription under my direction.

I further testify that I am not interested in the event of the action.

WITNESS my hand and seal this 23rd day of December, 1988.

Paul G. McMullin

PAUL G. MCMULLIN, CSR, RPR

RESIDING AT: St. George, Utah

MY COMMISSION EXPIRES: 6-17-91

NOTARY PUBLIC
STATE OF

JS 1. I know that I have constitutional rights under the Constitutions of Utah and the United States to plead not guilty and to have a jury trial upon the charges to which I have entered a plea of guilty or to a trial by the Court should I elect to waive a trial by jury. I know that I have a right to be represented by counsel and that I am in fact represented by JAMES L. SHUMATE as my attorney.

JS 2. I know that if I wish to have a trial upon the charges, I have a right to be confronted by the witnesses against me by having them testify, in open court, in my presence and before the Court and jury and that I have the right to have those witnesses cross-examined by my attorney. I also know that I have the right to have witnesses subpoenaed by the State, at its expense, to testify in Court upon my behalf and that I could, if I elected to do so, testify in Court upon my own behalf and that, if I choose not to do so, the jury can and will be told that this fact may not be held against me if I choose to have the jury so instructed.

JS 3. I know that if I were to have a trial, the State must prove each and every element of the crime charged to the satisfaction of the Court or jury beyond a reasonable doubt; that I would have no obligation to offer any evidence myself and that any verdict rendered by a jury, whether it be that of guilty or not guilty, must be by unanimous agreement of all jurors.

ATTACHMENT II.

FILED

NOV 17 1988

Clerk
Deputy

LEO G. KANELL
Beaver County Attorney
Attorney for Plaintiff
P. O. Box 471
Beaver, Utah 84713
Telephone: 438-2351

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF BEAVER, STATE OF UTAH

STATE OF UTAH,	:	STATEMENT OF DEFENDANT REGARDING PLEA BARGAIN,
Plaintiff	:	CERTIFICATES OF COUNSEL, AND ORDER
vs.	:	
TRACY EUGENE SMITH,	:	Criminal No. 631
Defendant.	:	

STATEMENT OF DEFENDANT REGARDING PLEA AGREEMENT

JS I, TRACY EUGENE SMITH, the above-named Defendant, under oath, hereby acknowledge that I have entered a plea of guilty to the charge of MURDER IN THE FIRST DEGREE, a capital offense, as contained in the Information on file against me in the above-entitled Court, a copy of which I have received, and I understand the charge to which this plea of guilty is entered is a capital felony and that I am entering such plea voluntarily and of my own free will after conferring with my attorney, JAMES L. SHUMATE, and with the knowledge and understanding of the following facts:

CRAIG S. COOK, No. 713
Attorney for Defendant-Appellant
3645 East 3100 South
Salt Lake City, Utah 84109
Telephone: 485-8123

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

TRACY EUGENE SMITH,

Petitioner,

vs.

HANK GALETKA, North Point Warden, UTAH STATE PRISON and THE STATE OF UTAH,

Respondents.

MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS HABEAS PETITIC

No. 920553

This Memorandum is written in opposition to Respondents' Motion to Dismiss the Petition for Writ of Habeas Corpus filed on December 18, 1992.

The State has distorted the factual record in this case as well as applicable case law, and has failed to correctly analyze the facts and legal principles as they apply to this case. For these reasons, therefore, Petitioner is compelled to respond to its Memorandum.

STATEMENT OF THE CASE

The State attempts to argue that Petitioner in December of 1988 had the opportunity of filing a direct appeal in this matter and did not do so. The State has left out, however, several

ATTACHMENT VII

important facts. For example, the State makes the following quotation:

> Petitioner therein stated that he had been assured by his attorney "that a timely notice of appeal would be filed with this Court, base[d] upon but not limited to effective assistance of counsel." (R. 69). (Respondent's Memorandum, at 2).

Respondents conveniently left out the last sentence that Petitioner wrote following that quoted by the respondents. It stated, "That counsel did not fully investigate the facts of the case at bar that could have proven the defendant's innocence." (R. 69). Thus, contrary to the State's repeated assertions, any mention of ineffective counsel in this prior motion had nothing whatsoever to do with the proceedings of the guilty plea but instead concerned a claim that counsel failed to investigate the facts of the killing.

A second serious omission concerns the facts and circumstances relating to the "notice of belated appeal." On January 27, 1989 the Clerk of this Court sent a notice to the Beaver County Clerk that a notice of appeal had been filed in Case No. 890027 (R. 74). On March 20, 1989 a hearing was held before the Honorable J. Philip Eves. Defendant was once again represented by his court-appointed attorney, James L. Shumate. If the question of this appeal becomes relevant, Petitioner would proffer that in his conversations with Mr. Shumate he was informed that he could not raise any claim of ineffectiveness of counsel on appeal and that therefore he should go into the Federal court and file a habeas corpus action if he was unhappy with Mr. Shumate's performance concerning the investigation. The

A life sentence for capital murder is an indeterminate sentence modifiable by the Board of Pardons. Otherwise the Court's recommendation of 20 years before parole would be irrelevant and meaningless and this Motion would never have been made. It is evident that the Utah Legislature considers a life sentence for capital murder as an indeterminate sentence, since it has enacted, since the sentencing in this case, a new possible sentence in such cases, life without possibility of parole. (See 76-3-201 *UCA*)

The defendant's Motion is denied. The sentence in his case was not illegal as he complains.

DATED this 3rd day of July 1996.

J. PHILIP EVES, District Court Judge

Minute Entry substantiates Petitioner's claim by the following statement:

> This matter was called on for hearing at the request of the defendant. Mr. Shumate informed and the defendant concurred that the motion be voluntarily withdrawn. Mr. Shumate stated that the defendant will pursue his requested relief in the Federal court system. The appeal was ordered withdrawn. (R. 86).

The motion to withdraw the guilty plea was filed on December 4, 1991 by the petitioner pro se. His sole grounds for the petition was that there was insufficient evidence to charge him with first degree murder.

ARGUMENT

POINT I

THIS PETITION IS NOT PROCEDURALLY BARRED SINCE PETITIONER COULD NOT HAVE BROUGHT HIS INEFFECTIVE ASSISTANCE CLAIM IN HIS PRIOR MOTION TO WITHDRAW HIS GUILTY PLEA.

The State argues that since Petitioner did not raise the ineffectiveness of counsel in his motion to withdraw the guilty plea he is now barred from raising it in this habeas corpus action. The State cites the case of Garrish v. Barnes as standing for the proposition "a motion to withdraw a guilty plea is a prior post-conviction proceeding for procedural bar purposes." Again, the State completely distorts the status of Utah law. In Garrish this Court held that Garrish was procedurally barred by failing to raise the issue of the breached plea bargain on appeal from the denial of the motion to withdraw the guilty plea. This Court did not hold that the motion to withdraw the guilty plea precluded a subsequent habeas corpus action.

the position, citing no authority supporting his view, that a life sentence is not an indeterminate sentence.

The Court now holds that the position of the defendant is incorrect under the Utah sentencing scheme. In fact a life sentence for Murder, a capital felony, is an indeterminate sentence. Therefore the sentence is not illegal.

Under Utah's sentencing scheme, all commitments to prison are considered indeterminate sentences unless otherwise provided by law. (77-18-4 *UCA*) Utah's Constitution and statutes provide for a Board of Pardons which body is charged with the authority and responsibility of determining whether a sentence will be fully served, modified, or terminated. (See 77-27-5 *UCA*; Andrus v. Turner, 590 P.2d 363; Raslins v. Holden, 869 P-2d 958.)

The Board of Pardons has unfettered discretion in carrying out its function and its decisions are not subject to judicial scrutiny, except in limited cases.

An indeterminate sentence is one fixed by the sentencing authority (the Court) as a maximum sentence or within a possible minimum/maximum range, understanding that the actual time to be serve will be later determined by another entity, the Board of Pardons.[1] The alternative plan, determinate sentencing, is used in some states and jurisdictions. Under determinate sentencing the Court fixes the exact number of years, months or days to be served by the defendant and no other entity has authority to require more or less, as long as the sentence is legally permissible. This is not Utah's approach to sentencing.

---

[1]See Mutart v. Pratt, 170 P.67; State v. Empey, 239 P.25; Lee Lim v. Davis, 284 P.232.

Counsel has read the Garrish case several times and has been unable to find anywhere in the opinion that a motion to withdraw a guilty plea is considered a prior post-conviction proceeding in relation to habeas corpus petitions. Rule 20, for example, of the Utah Rules of Appellate Procedure only requests a "statement indicating whether any other petition for a writ of habeas corpus based upon the same or similar grounds has been filed and the reason why relief was denied. (Rule 20(c)(3)).

The issues in a motion to withdraw a guilty plea and a habeas corpus action can be quite distinct. In the motion to withdraw action, the question is whether the defendant made a knowing plea or whether the State and the Court breached its agreement with the defendant. In many cases involving guilty plea motions no claim whatsoever is made of ineffectiveness of counsel. Likewise, a claim of ineffectiveness of counsel in a habeas corpus action may have nothing whatsoever to do with the entry of the guilty plea. It is for this reason that two post-conviction remedies cannot be used as procedural bars in the sense of two successive petitions for habeas corpus.

The distinction in Garrish and the instant case is remarkable. Garrish was convicted of child abuse and was ultimately sentenced to a minimum mandatory term of six years to life. During the proceedings he was represented by three separate attorneys. Here, Petitioner, who was 21 years old at the time of the conviction, was represented by only one attorney and was sentenced to life imprisonment with a twenty-year recommendation of imprisonment. This recommendation is now being

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR BEAVER COUNTY, STATE OF UTAH

STATE OF UTAH, — Plaintiff, vs. TRACY EUGENE SMITH, Defendant.	MEMORANDUM OPINION CASE NO. 631

The defendant, Tracy Eugene Smith, entered a plea of guilty to the crime of Murder in the First Degree, a capital felony, on November 14, 1988. The Court sentenced him to serve a life sentence and recommended to the Board of Pardons that he serve at least 20 years before being allowed parole. The defendant has since filed at least one appeal and several petitions for extraordinary relief.

On May 15, 1996, the defendant caused to be filed a "Motion for an Order of Court Correcting a Sentence that was Imposed in an Illegal Manner." The defendant moves the Court to correct or modify the sentence given by deleting the Court's recommendation that the defendant serve 20 years before being paroled. The defendant correctly argues that the Court can correct an illegal sentence at any time. (See Rule 22, *Utah Rules of Criminal Procedure.*)

The alleged illegality raised by the defendant is that the Court sentenced the defendant to a life sentence and then made a recommendation pursuant to 77-27-13(5) *UCA*. The defendant argues that the Court acted illegally because that statutory provision, by its own terms, applies only to cases where an "indeterminate sentence is imposed." Defendant takes

followed by the Board of Pardons.

Garrish involved (1) a direct appeal, (2) a full evidentiary hearing as to a subsequent motion to withdraw the guilty plea, (3) an appeal from that denial; (4) three separate habeas corpus actions; and (5) an appeal from the denial of the third habeas corpus petition. In contrast to this abundance of judicial procedure in Garrish, the petitioner in this case did not file any direct appeal from his entry of guilty plea based upon the advice of his court-appointed attorney, James Shumate. Appearing pro se, Petitioner filed a motion to withdraw the guilty plea but no evidentiary hearing was held. The Court ordered the dismissal of the motion based solely upon the record. It was not until the proceedings before this Court with Petitioner's new court-appointed attorney that the present claims in the direct appeal and habeas corpus action have been made. This blemished legal process supports the contention of Justice Zimmerman in Garrish that counsel should be provided in a thorough post conviction proceeding and appeal.

Clearly, Petitioner was not previously aware of the ineffectiveness of counsel in sentencing now being asserted in the habeas corpus action filed in this court. The State's repeated reference that he was aware of such a claim four years earlier is a complete distortion of the record. (Respondents' Brief at 4). His earlier statement in his affidavit concerning his counsel's failure to investigate the facts of the crime certainly does not preclude an ineffectiveness claim being made as to his counsel's performance during the guilty plea proceeding

ATTACHMENT VI

itself.

In failing to file a direct appeal, Petitioner cannot be held accountable for listening to the advice of the court-appointed attorney who is now being accused of being ineffective. Fernandez v. Cook, 783 P.2d 547 (Utah 1989). In addition, this Court has held that the writ of habeas corpus is a flexible protection to protect against the denial of a constitutional right in a criminal conviction and that the "good cause" requirement is justified for a number of reasons including the existence of fundamental unfairness in a conviction. Hearst v. Cook, 777 P.2d 1029 (Utah 1989).

Accordingly, this petition is not procedurally barred and must not be dismissed.

POINT II

THIS PETITION SHOULD NOT BE DISMISSED UNDER HILL V. LOCKHART.

The State next argues that under Hill v. Lockhart, 474 U.S. 52 (1985) Petitioner has failed to allege sufficient prejudice to allow this matter to proceed. This claim is broken by the State into two parts: first, the assertion by Petitioner that his counsel failed to inform him as to the twenty-year sentence recommendation or that the judge could make such a recommendation; and second, the other matters concerning counsel's representation during the guilty plea proceeding. These parts will now be addressed sequentially.

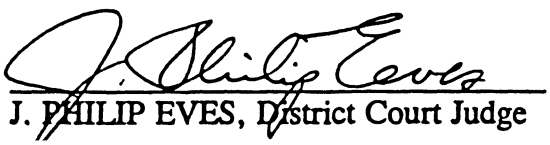
The Hill v. Lockhart case, contrary to the State's assertion, is not identical "in all material respects to the case at bar." In Hill the petitioner claimed his attorney failed to

Defendant has had repeated opportunities to raise this issue, including a prior motion to withdraw his plea. There is no new evidence alleged by defendant. The limitations period for post-conviction relief has passed. (See 78-35a-107 UCA)

Pursuant to Rule 65B(5), Utah Rules of Civil Procedure, this court now finds that this motion is frivolous, repetitive and without merit. In addition, it is unsupported by the records of the plea.

Accordingly for the reasons set out above, the Motion is denied.

DATED this 21st day of August 1997.



J. PHILIP EVES, District Court Judge

properly advise him as to his eligibility for parole under the sentence agreed to in the plea bargain. The Supreme Court held that neither Arkansas nor Federal law required that petitioner be informed of his parole eligibility date prior to pleading guilty. The Court stated:

> We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the Federal court. 474 U.S. at 56.

In the instant case, the information which was omitted by Petitioner's counsel was not that of parole but was that of sentencing. Numerous cases hold that matters affecting the sentence of a defendant allow withdrawal of a guilty plea if all elements and facts and circumstances are not fully explained. See State v. Smith, 776 P.2d 929 (Utah 1989); State v. Copeland, 765 P.2d 1266 (Utah 1988); State v. West, 765 P.2d 891 (Utah 1988); State v. Vasilacopulous, 756 P.2d 92 (Utah App. 1988).

Once again, the State has distorted the record by failing to complete the quotation cited in Respondents' memorandum. The State makes the following assertion:

> In his affidavit he states under oath, "Had I known that the judge was going to make this kind of recommendation I don't know whether I would have entered this plea or not... (Respondents' Memorandum at 7).

The State omitted the following subsequent language of that sentence, "since the state had very weak evidence concerning the attempt to rob Mr. Bray." (Affidavit at 18).

Section 78-35a-109 UCA requires the court to consider two factors in deciding whether to appoint pro bono counsel. The court has considered those factors. This case raises only one issue, ie: whether the defendant can withdraw his plea of guilty. Defendant alleges that this court failed to comply with the provisions of Rule 11, U.R.Crim.P. There is no need for an evidentiary hearing as the issues can be decided from the transcripts and records of the taking of the plea. In addition, in view of the provisions of 78-35a-106 UCA and 78-35a-107 UCA, this court will be dismissing and denying the Motion because the Statute of Limitations period has passed and the claim raised by the defendant in this motion was raised and addressed in previous appeal proceedings, or should have been, or was raised and addressed in previous post conviction relief proceedings, or should have been.

The issues do not appear complicated and there is no need for an evidentiary hearing. Thus the appointment of pro bono counsel is not warranted.

The petitioner's Motion for Appointment of Legal Counsel is denied.

MOTION TO WITHDRAW GUILTY PLEA AND CORRECT ILLEGAL SENTENCE

On August 4, 1997, Mr. Smith filed a Notice to Submit for Decision and Request for Hearing on his most recent motion to withdraw the guilty plea. The Court declines to set the matter for oral argument. The Court has read the Motion submitted by Mr. Smith and the affidavits included herewith. Mr. Smith challenges the entry of the plea in this case on the grounds that he was not advised that the recommendations of the prosecution and his own attorney were not binding upon the Court.

The Lockhart case acknowledged that in many instances an inquiry of "prejudice" will depend on likelihoods of various circumstances and how they would have most probably affected the outcome of a trial or plea. Petitioner was entitled to be informed of all available pertinent information concerning sentencing. By not being given this information he was clearly prejudiced as a matter of law by being unable to make a knowing and voluntary decision. If he stated today that he would not have entered the plea had he known this twenty-year recommendation would be made, such a statement would be meaningless since the inquiry in these type of cases is at the time the guilty plea was made. The failure to correctly advise a defendant as to pertinent sentencing information creates automatic prejudice regardless of what outcome a defendant may have chosen had he been correctly advised.

The second portion of the argument made by the State is equally absurd. The State claims that the petition never alleges that but for counsel's errors the judge would have made a different recommendation or no recommendation at all. (Respondents' Brief at 8). This statement is simply not true. As noted in the Memorandum of Points and Authorities which was incorporated by reference in the habeas corpus petition, "had Petitioner's appointed counsel been effective the twenty-year recommendation made by the lower court at the conclusion of the sentencing proceeding may well not have been made." (Petitioner's Memorandum of Points and Authorities at 2). Moreover, Petitioner devoted seven pages of his Memorandum to showing the prejudice

determination was appealed. On April 3, 1997, the Court of Appeals issued a Memorandum Opinion upholding the decision of the trial court.

In addition Mr. Smith filed in the 3rd-District Court the case of Smith v. Galetka, Case No. 930900217, which was a Petition for Writ of Habeas Corpus. In that case Mr. Smith raised additional claims as to the propriety of the taking of his plea. The trial court ruled against Mr. Smith in that case, and Mr. Smith did not appeal.

MOTION TO APPOINT LEGAL COUNSEL

On July 28, 1997, Mr. Smith filed yet another Motion to Withdraw Guilty Plea and Correct Illegal Sentence. He now seeks to have this Court appoint counsel to represent him and proposes to require the County of Beaver to pay the costs of that Motion and the subsequent proceedings.

Under the provisions of 78-35a-101 UCA, et. Seq., the Court has authority only to appoint pro bono counsel. There is no provision for appointments paid by the county where the conviction occurred.

This Court apparently has discretion as to whether or not to appoint counsel. (See 78-35a-109 UCA) Although this is a serious case for the petitioner in view of the long period of confinement which he is undergoing, the Court is of the opinion that Mr. Smith has had several opportunities to raise the issues which he thought were appropriate relating to his entry of his plea of guilty in this case. The Court can see no reason to appoint counsel in this case and hereby declines to do so.

which occurred or could have occurred because of counsel's conduct during the sentencing proceedings. See Petitioner's Memorandum at 10-16.

The State wishes Petitioner to be a fortune teller. The State wishes Petitioner to allege what the judge woud have done had Petitioner's attorney presented the information to him as he should have done under an effective counsel standard. Petitioner submits that there is a reasonable probability that the conduct of his counsel undermined the confidence in the outcome of the sentencing recommendation. Again, Petitioner was entitled to present reliable information to the court as part of his constitutional sentencing rights. Whether the judge would have done anything differently after this material had been presented is not the question. It is the failure to present this material which is the crux of this petition. In the context of a trial setting, it cannot be said that the complete failure of Mr. Shumate to present any evidence or arguments in the sentencing hearing was "harmless error."

The State also wishes Petitioner to prove beyond a reasonable doubt that the twenty-year recommendation made by the court conclusively caused the twenty-year sentence imposed by the Board of Pardons. This kind of proof is not required here. The mere coincidence of the twenty-year term in both proceedings establishes a "reasonable probability" that the judge's recommendation was followed by the Board of Pardons.

The State, in summary, is attempting to use technicalities to escape a clear case of possible injustice. If it is necessary

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR BEAVER COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. TRACY EUGENE SMITH, Defendant.	MEMORANDUM OF POINTS AND AUTHORITIES CASE NO. 631

This matter came before the Court this date on the petitioner's Motion and Order for Appointment of Legal Counsel. The petitioner moves the Court for appointment of legal counsel to be paid by Beaver County and to pursue petitioner's most recent motion to withdraw his plea.

The defendant was convicted of murder upon his plea of guilty on November 14, 1988. Thereafter in December 1991, the defendant filed a motion to withdraw his guilty plea after having lost his direct appeal rights by inaction. The Court denied the request to withdraw the guilty plea and the matter was pursued by appeal to the Supreme Court of the State of Utah. On December 27, 1993, the Supreme Court issued its opinion addressing the claims raised by the defendant, including the letter written by this Court to the Board of Pardons recommending that the defendant serve at least 20 years. The trial court's denial of the Motion to Withdraw the plea was upheld. Thereafter the defendant herein filed a motion for an order of the Court correcting the sentence which Mr. Smith claimed was illegal. The Court issued a Memorandum Opinion on July 19, 1996, in which the defendant's motion was denied. That

to weigh probabilities and "what ifs" then an evidentiary hearing should be held so that factual findings can be made concerning these predictions and probability assessments. Petitioner would assert, however, that the record on its face clearly shows that he was denied effective representation of counsel by the complete failure to meet the standards of an attorney representing a defendant in a capital murder case in which a substantial sentence is extremely possible.

For these reasons, therefore, this matter should be set for hearing either on the merits or remanded for an evidentiary hearing to answer any of the questions that are pertinent to this petition.

DATED this 28th day of December, 1992.

Craig S. Cook
Attorney for Petitioner

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing to J. Frederic Voros, Jr., Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 this 28th day of December, 1992.

ATTACHMENT V

Craig Stephens Cook
ATTORNEY AT LAW
3645 EAST 3100 SOUTH
SALT LAKE CITY UTAH 84109

(801) 485 8123
FAX (801) 485 2925

TO

DATE Feb 23, 1995

SUBJECT

Dear Tracy:

I received your letter last week. I'm afraid that money is not really the problem. I would help you now if I could. I don't think there is a chance of removing the Judge's recommendation & it probably doesn't matter anyway since the Board in light of the Pleece decision can do whatever it wants.

Section 76-3-402 may let you apply for a lower sentence but it probably only provides for initial reductions not years later. You could try!

Your third choice is to claim ineffective counsel when you were given bad advice at the guilty plea. You would have to appeal Judge Young's decision - because Shurtleff is a judge, however, the chances are very slim.

I think your best bet is to ask the Board for a rehearing every year if necessary and to try to keep a good record. They might reduce your time if they feel you are not a risk.

I'm getting out of the prison business so I can't take your case any further. If you want some suggestions of other attorneys let me know.

Good luck

Craig Cook

Id., *quoting* Hurst v. Cook, 777 P.2d 1029, 1036 (Utah 1989). This Court finds that the present motion merely recited those arguments made by Defendant on other occasions, and represents an attempt to keep his case alive indefinitely. As such, it was within this Court's discretion to dismiss the present motion without including findings of fact or conclusions of law.

14. Based on the foregoing, Defendant's Motion of Reconsideration of Defendant's Motion to Withdraw Guilty Plea and Correct Illegal Sentence is DENIED.

Dated at Parowan, Utah this 30th day of September, 1997.

BY THE COURT:

J. Philip Eves

JUDGE J. PHILIP EVES

January 13, 1994

Honorable David S. Young
Third District Court
240 East 400 South
Salt Lake City, Utah 84111

Re: Tracy Eugene Smith v. Hank Galetka, et al.
Case No. 93-0900217HC

Dear Judge Young:

I have recently completed an extensive review of this case together with the decision rendered last month by the Utah Supreme Court. Unfortunately, because of various procedural difficulties which have occurred in this case, I am at a loss as to how to proceed. For this reason, I would request a conference with counsel in order to have the opportunity to determine how to proceed in the future.

In order to allow the Court and counsel an insight into my concerns I offer the following. At the conclusion of the hearing in this case you ordered that Ms. Micklos prepare Findings in support of your judgment. I was to be sent the Findings for my approval as to form. Accordingly, Ms. Micklos sent me her proposed Findings and in order to try to expedite this case I sent to her my proposed changes to her Findings and Conclusions on November 3, 1993. On November 9 she sent me a letter stating she could not accept these changes and that the Findings would therefore be submitted to.

I assumed that my objections were also included with her Findings but I do not know if they were or not. In any event, on November 22 the Court executed the Findings and Judgment. On November 29 I sent this Court a letter stating that I was not sure if my objections had been received and therefore enclosed a copy of my objections for consideration. At that time I did not know that the Court had already executed the Findings and Order.

On December 14 this Court issued a Minute Entry declining to sing the requested Findings offered by me but finding that the Court disagreed with portions of two of the findings and

10. The burden of satisfying the first prong weighs heavily against the Defendant. "To prevail on the first prong, a petitioner must overcome a strong presumption that counsel rendered adequate assistance." Id. (citations omitted). This requires the Defendant to demonstrate specific instances where counsel acted or failed to act in a manner which does not meet an objective standard of reasonableness. Id. (citations omitted). Importantly, courts reviewing an attorney's performance will grant "counsel wide latitude to make tactical decisions and will not question such decisions unless . . . [there is] 'no reasonable basis' for them." Id., *quoting* Fernandez v. Cook, 870 P.2d 870, 876 (Utah 1993).

11. In the present case, defense counsel addressed the Court with regard to the weaknesses in the State's case against the Defendant. At that time, defense counsel stated that, in light of the fact that Defendant's co-defendant was involved in a criminal case arising out of the same incident, and that testimony might be elicited in that case which would implicate the Defendant in a robbery offense, it was advisable for the Defendant to accept the terms of the plea. When taking the co-defendant's criminal case into consideration, and the possibility that Defendant faced a death sentence if his case had resulted in a jury trial, it is the opinion of this Court that defense counsel's advice that Defendant sign the plea agreement had a reasonable basis which does not reflect ineffective assistance of counsel.

12. As this Court has determined Defendant failed to satisfy the first prong required to establish ineffective assistance of counsel, it will not reach the issue of whether Defendant satisfied the second prong. Therefore, this Court finds that the Defendant has failed to set forth any new facts or present any other reason which would warrant providing relief from this Court's August 21, 1997 decision.

13. In conclusion, this Court would direct Defendant's attention to the Court's finding in the August 21, 1997 Memorandum of Points and Authorities, wherein the Court determined that Defendant's motion was frivolous, repetitive and without merit pursuant to U.R.C.P. 65(B)(5). This Court would also direct Defendant's attention to the case Wright v. Carver, 886 P.2d 58, 60 (Utah 1994), which held:

> "A ground for relief from a conviction or sentence that has once been fully and fairly adjudicated on appeal or in a prior habeas proceeding should not be readjudicated unless it can be shown that there are 'unusual circumstances.' . . .This rule was fashioned to prevent abuse by prisoners who burden the courts and frustrate the ends of justice by trying to keep cases alive indefinitely.'"

conclusions which had in fact been executed. The Court stated, "The Findings entered may remain with these adjustments."

On December 27, 1993 the Supreme Court in Case No. 92-0141 affirmed the lower court's denial of Mr. Smith's Motion to Withdraw his guilty plea and discussed the issue that was raised for the first time on appeal concerning Appellant's claim that the lower court had insufficient evidence in order to make a twenty year recommendation of a sentence. Because this issue was raised for the first time on appeal, the Supreme Court refused to hear it. The Court stated, "However, the District Court may address the issue of the twenty-year recommendation in Smith's pending Petition for Writ of Habeas Corpus."

These procedural events, as seems to be typical of this case, cannot be readily classified under our rules of civil procedure. I view them as follows: The state submitted proposed Findings to the Court which had not been approved as to form by myself. Through a misunderstanding I assumed that my objections had been filed concurrently but apparently they were not. This Court, based upon no objections, entered the Findings on November 22.

No official notice was sent to me that the Judgment had been entered in accordance with Rule 58A(d). Nevertheless, I sent to this Court my proposed changes and additions to the Findings submitted by the State. This letter and proposed Findings was essentially a motion under Rule 52 or Rule 59 requesting an amendment of the Findings and Judgment.

The Minute Entry of December 14, in my view, was therefore a decision denying the requested changes except for two specific Findings. The Minute Entry, however, is not a final order for any purpose and thus an order needs to be prepared officially amending the previously-entered Findings.

Since a final judgment has not been entered in this case Rule 59 would allow Petitioner to file a Motion to Open the Judgment to take additional evidence, if necessary, as to the issue that has been referred to this Court by the Utah Supreme Court.

After this Court enters a decision as to the "judge's recommendation issue", then the entire matter could be finalized if an order which then could be appealable to the Supreme Court in Petitioner desires.

While I acknowledge that this above scenario is open to debate, I believe that this is the precise reason that a conference should be held in order to discuss the most prudent way of proceeding to avoid any further road blocks to completing this case. I would be most happy to schedule a conference with the Court and with Ms. Micklos at any time during the next four weeks.

the purpose behind this rule is to ensure defendants are guaranteed their constitutional rights.

7. However, this Court would also point out that the provision at issue affords protection only if sentencing recommendations are allowed by the court. In the case at hand, the Defendant was charged with a capital offense, the criminal penalties for which are statutorily designated as either the death penalty or life imprisonment. U.C.A. § 76-3-207(4), (6) (1996). In addition, the parties had entered into a conditional plea agreement which expressly provided that Defendant would be sentenced to life imprisonment rather than face the potentiality of a death sentence in a trial by jury. Therefore, according to the statute, and the plea arrangement agreed to by the parties, the term of Defendant's sentence was not an issue at the time of sentencing.

8. At the time the Defendant entered his plea, this Court asked counsel if they had any recommendations regarding sentencing. This question, taken out of context, may be what has confused the Defendant and led him to believe that some violation of his Rule 11 rights was violated. However, when taken in context, the question was asked and responded to in light of Defendant's right to delay the imposition of sentencing for a period of thirty days. Counsel for the Defendant responded by saying that the Defendant desired to waive that time, and that a presentence report was unnecessary in light of the nature of the plea. Therefore, this Court does not find merit in Defendant's claim that the Court erred by violating Defendant's Rule 11 protections.

9. With respect to Defendant's claim that he received ineffective assistance of counsel at the time he entered his plea, this Court agrees with Defendant's interpretation of U.C.A. § 78-35a-106(2), insofar as the statute permits individuals challenging a conviction or sentence to seek relief on grounds they received ineffective assistance of counsel, and that this claim is exempt from the statute of limitations period governing appeals. However, this Court would add that, in order to establish that he was poorly represented, the Defendant must satisfy a two-prong test:

> First, a petitioner must show "that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment." . . .Second, a petition must show that his counsel's performance prejudiced him.

Taylor v. Warden, 905 P.2d 277, 282 (Utah 1995); *quoting* Bundy v. Deland, 763 P.2d 803, 805 (Utah 1988).

I appreciate your attention in this matter.

Very truly yours,

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Craig S. Cook

CSC:kd

cc: Angela F. Miklos
Assistant Attorney General
236 State Capitol Bldg.
Salt Lake City, Utah 84114

not timely, in that the applicable statute of limitations period had expired for bringing forward such motions. (Id. at p. 3)

3. Defendant claimed he was not advised that the recommendations made by the prosecutor and defense counsel were not binding on the Court, and that such knowledge would have altered the outcome. This Court declined to grant Defendant's motion on this claim on grounds that the Defendant failed to present new evidence, and that the statute of limitations period had expired for that relief as well. (Id. at pp. 3-4)

4. Defendant's present motion requests a reconsideration of that prior order. The Defendant primarily focuses on two different claims. First, the Defendant claims that he was inadequately represented by counsel at the time the plea agreement was entered on the record, in that the State would be unable to establish that Defendant had the requisite intent to commit the crime in a trial on the matter, which defense counsel failed to properly consider. Second, the Defendant claims that this Court committed error in failing to advise the Defendant that any sentencing recommendations agreed upon by the prosecution and defense counsel were not binding on the Court.

5. As a preliminary matter, this Court finds that the rules of civil procedure do not include a provision for motions for reconsideration. *See* Ron Shepherd Ins., Inc. v. Shields, 882 P.2d 650 (Utah 1994). However, it has been the practice of some courts to address motions which have been so titled as if they had been filed pursuant to an applicable rule. *See* Watkiss & Campbell v. Foa & Son, 808 P.2d 1061 (Utah 1991). This Court finds that Defendant's motion finds some applicability with Rule 60 of the rules of civil procedure, which provides for relief from a judgment or order. A motion for relief from a judgment or order may be granted by a court to provide relief from a final judgment, order, or proceeding under certain circumstances, including but not limited to the discovery of new evidence, or any other reason justifying relief. U.R.C.P. 60(b) (1997).

6. With respect to Defendant's claim that this Court failed to properly advise according to U.R.Cr.P. 11(g)(2), this Court finds that this rule provides the following:

> If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

This Court agrees that, in accordance with the decision State v. Gibbons, 740 P.2d 1309 (Utah 1987), courts are required to strictly comply with the provisions of Rule 11, and that

ATTACHMENT III

IN THE FIFTH JUDICIAL DISTRICT COURT
BEAVER COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. TRACY EUGENE SMITH, Defendant.	**MEMORANDUM DECISION** CASE NO. 631 JUDGE J. PHILIP EVES

The above-captioned matter came before this Court on Defendant's Motion of Reconsideration of Defendant's Motion to Withdraw Guilty Plea and Correct Illegal Sentence. The Defendant moves this Court to reconsider the decision executed August 21, 1997, wherein the Court denied Plaintiff's Motion and Order for Appointment of Legal Counsel. This Court has reviewed Defendant's motion, as well as the Court's previous decisions on similar motions. Having reviewed the file, having reviewed the applicable law, and deeming itself fully advised in the premises, the Court now makes the following findings and conclusions:

1. On November 14 1988, the Defendant was convicted of murder pursuant to the entry of a guilty plea. What followed thereafter were numerous attempts, both to this Court and to the state appellate courts, on the part of the Defendant to have this guilty plea withdrawn and have the matter set for trial. In all such instances, this Court denied Defendant's motions, which denials were affirmed by the appellate courts.

2. Following Defendant's July 28, 1997 Motion to Withdraw Guilty Plea and Correct Illegal Sentence, wherein Defendant requested the Court to appoint legal counsel and requested that his guilty plea be withdrawn and his sentence be "corrected," this Court issued a decision denying Defendant's motion. At that time, this Court held that, though it was within its discretion to appoint counsel on a pro bono basis, that Defendant's petition neither contained factual allegations necessitating an evidentiary hearing, nor did it involve complicated issues of law or fact requiring the assistance of counsel. Therefore, this Court declined to appoint legal counsel on Defendant's behalf, pursuant to U.C.A. § 78-36-109 (1996). (Mem. of P. & A., pp. 2-3) This Court further found that Defendant's motion was

Call me after you have read

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Appellee,

v.

Tracy Eugene Smith,
Defendant and Appellant.

No. 920141

F I L E D
December 27, 1993

Geoffrey J. Butler, Clerk

Fifth District, Beaver County
The Honorable Philip J. Eves

Attorneys: R. Paul Van Dam, Att'y Gen., Joanne C. Slotnik, Asst. Att'y Gen., Salt Lake City, for plaintiff
Craig S. Cook, Salt Lake City, for defendant

STEWART, Justice:

Tracy Eugene Smith pleaded guilty to first degree murder. He was charged with intentionally causing the death of another while engaged in the commission of or an attempt to commit robbery or aggravated robbery. See Utah Code Ann. § 76-5-202(1)(d). The trial court sentenced him to life imprisonment and recommended that "the Defendant not be allowed parole or even be considered for parole until he has served at least Twenty (20) years."

On December 4, 1991, Smith moved to withdraw his guilty plea on the ground that the trial court could not have reasonably accepted a guilty plea for capital murder because Smith had denied that he was attempting to rob the victim at the time of the murder. On February 24, 1992, the trial court denied the motion to withdraw the guilty plea. Smith filed a notice of appeal from that ruling on March 20, 1992. Subsequently, on December 4, 1992, Smith filed a petition for a writ of habeas corpus in this Court, alleging that he had received ineffective assistance of counsel during the sentencing proceeding. On January 5, 1993, this Court referred the habeas petition to the Third District Court, where it is currently pending.

ATTACHMENT IV

Counsel was appointed to represent Smith on his appeal from the denial of his motion to withdraw his guilty plea. Counsel states in his brief for defendant:

> After review of the record appellate counsel concluded that the lower court was absolutely correct in its ruling. Since Mr. Miller [a co-defendant] was purportedly ready to testify as to the intention of robbing the victim there is no question but that a jury could have believed Miller's testimony and [could] have found Defendant guilty of capital murder. The argument that Defendant made to the lower court was simply without merit.
>
> Initially, counsel considered filing an Anders brief allowing Defendant to argue his position in spite of counsel's belief to the contrary. Appellate counsel has spoken [at] length with Defendant at the Utah State Prison and is now able to represent that Defendant concurs in this assessment and therefore withdraws any appeal based upon the grounds previously raised below.

Counsel further states that under State v. Clayton, 639 P.2d 168 (Utah 1981), and State v. Gabaldon, 735 P.2d 410 (Utah Ct. App. 1987), an attorney representing a criminal defendant on appeal may withdraw only if he finds the case to be wholly frivolous but that "the present situation is somewhat of a hybrid. The grounds raised by the defendant are clearly frivolous and cannot be supported. On the other hand, grounds that were not raised by the defendant below are, in the opinion of counsel, meritorious and deserve consideration by some reviewing court." We agree that other evidence of Smith's intent to rob existed and that the trial court properly denied the motion to withdraw the guilty plea.

The issue that appellate counsel urges us to address for the first time on appeal is whether the trial court erred in entering a twenty-year recommendation of incarceration with respect to Smith's prison sentence. Counsel asserts that there was no factual record before the trial court justifying that recommendation. We refuse to address the issue.

It is black-letter law that an appellate court will not address issues raised for the first time on appeal except in extraordinary circumstances that do not exist here. Ong Int'l, Inc. v. 11th Ave. Corp., 850 P.2d 447, 455 (Utah 1993); State v. Allen, 839 P.2d 291, 302 (Utah 1992); State v. Steggell, 660 P.2d 252, 254 (Utah 1983). However, the district court may address

the issue of the twenty-year recommendation in Smith's pending petition for a writ of habeas corpus.

Affirmed.

WE CONCUR:

Gordon R. Hall, Chief Justice

Richard C. Howe, Associate Chief Justice

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1. On November 14 1988, the Defendant was convicted of murder pursuant to the entry of a guilty plea. What followed thereafter were numerous attempts, both to this Court and to the state appellate courts, on the part of the Defendant to have this guilty plea withdrawn and have the matter set for trial. In all such instances, this Court denied Defendant's motions, which denials were affirmed by the appellate courts.

2. Following Defendant's July 28, 1997 Motion to Withdraw Guilty Plea and Correct Illegal Sentence, wherein Defendant requested the Court to appoint legal counsel and requested that his guilty plea be withdrawn and his sentence be "corrected," this Court issued a decision denying Defendant's motion. At that time, this Court held that, though it was within its discretion to appoint counsel on a pro bono basis, that Defendant's petition neither contained factual allegations necessitating an evidentiary hearing, nor did it involve complicated issues of law or fact requiring the assistance of counsel. Therefore, this Court declined to appoint legal counsel on Defendant's behalf, pursuant to U.C.A. § 78-36-109 (1996). (Mem. of P. & A., pp. 2-3) This Court further found that Defendant's motion was

ATTACHMENT III

not timely, in that the applicable statute of limitations period had expired for bringing forward such motions. (Id. at p. 3)

3. Defendant claimed he was not advised that the recommendations made by the prosecutor and defense counsel were not binding on the Court, and that such knowledge would have altered the outcome. This Court declined to grant Defendant's motion on this claim on grounds that the Defendant failed to present new evidence, and that the statute of limitations period had expired for that relief as well. (Id. at pp. 3-4)

4. Defendant's present motion requests a reconsideration of that prior order. The Defendant primarily focuses on two different claims. First, the Defendant claims that he was inadequately represented by counsel at the time the plea agreement was entered on the record, in that the State would be unable to establish that Defendant had the requisite intent to commit the crime in a trial on the matter, which defense counsel failed to properly consider. Second, the Defendant claims that this Court committed error in failing to advise the Defendant that any sentencing recommendations agreed upon by the prosecution and defense counsel were not binding on the Court.

5. As a preliminary matter, this Court finds that the rules of civil procedure do not include a provision for motions for reconsideration. *See* Ron Shepherd Ins., Inc. v. Shields, 882 P.2d 650 (Utah 1994). However, it has been the practice of some courts to address motions which have been so titled as if they had been filed pursuant to an applicable rule. *See* Watkiss & Campbell v. Foa & Son, 808 P.2d 1061 (Utah 1991). This Court finds that Defendant's motion finds some applicability with Rule 60 of the rules of civil procedure, which provides for relief from a judgment or order. A motion for relief from a judgment or order may be granted by a court to provide relief from a final judgment, order, or proceeding under certain circumstances, including but not limited to the discovery of new evidence, or any other reason justifying relief. U.R.C.P. 60(b) (1997).

6. With respect to Defendant's claim that this Court failed to properly advise according to U.R.Cr.P. 11(g)(2), this Court finds that this rule provides the following:

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This Court agrees that, in accordance with the decision State v. Gibbons, 740 P.2d 1309 (Utah 1987), courts are required to strictly comply with the provisions of Rule 11, and that

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12. As this Court has determined Defendant failed to satisfy the first prong required to establish ineffective assistance of counsel, it will not reach the issue of whether Defendant satisfied the second prong. Therefore, this Court finds that the Defendant has failed to set forth any new facts or present any other reason which would warrant providing relief from this Court's August 21, 1997 decision.

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January 13, 1994

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Re: Tracy Eugene Smith v. Hank Galetka, et al.
Case No. 93-0900217HC

Dear Judge Young:

I have recently completed an extensive review of this case together with the decision rendered last month by the Utah Supreme Court. Unfortunately, because of various procedural difficulties which have occurred in this case, I am at a loss as to how to proceed. For this reason, I would request a conference with counsel in order to have the opportunity to determine how to proceed in the future.

In order to allow the Court and counsel an insight into my concerns I offer the following. At the conclusion of the hearing in this case you ordered that Ms. Micklos prepare Findings in support of your judgment. I was to be sent the Findings for my approval as to form. Accordingly, Ms. Micklos sent me her proposed Findings and in order to try to expedite this case I sent to her my proposed changes to her Findings and Conclusions on November 3, 1993. On November 9 she sent me a letter stating she could not accept these changes and that the Findings would therefore be submitted to.

I assumed that my objections were also included with her Findings but I do not know if they were or not. In any event, on November 22 the Court executed the Findings and Judgment. On November 29 I sent this Court a letter stating that I was not sure if my objections had been received and therefore enclosed a copy of my objections for consideration. At that time I did not know that the Court had already executed the Findings and Order.

On December 14 this Court issued a Minute Entry declining to sing the requested Findings offered by me but finding that the Court disagreed with portions of two of the findings and

Id., *quoting* Hurst v. Cook, 777 P.2d 1029, 1036 (Utah 1989). This Court finds that the present motion merely recited those arguments made by Defendant on other occasions, and represents an attempt to keep his case alive indefinitely. As such, it was within this Court's discretion to dismiss the present motion without including findings of fact or conclusions of law.

14. Based on the foregoing, Defendant's Motion of Reconsideration of Defendant's Motion to Withdraw Guilty Plea and Correct Illegal Sentence is DENIED.

Dated at Parowan, Utah this 30th day of September, 1997.

BY THE COURT:

JUDGE J. PHILIP EVES

Craig Stephens Cook
ATTORNEY AT LAW
3645 EAST 3100 SOUTH
SALT LAKE CITY UTAH 84109

(801) 485 8123
FAX (801) 485 2925

TO

DATE Feb 23, 1995

SUBJECT

Dear Tracy:

I received your letter last week. I'm afraid that money is not really the problem. I would help you now if I could. I don't think there is a chance of removing the Judge's recommendation & it probably doesn't matter anyway since the Board in light of the Preece decision can do whatever it wants.

Section 76-3-402 may let you apply for a lower sentence but it probably only provides for initial reductions not years later. You could try!

Your third choice is to claim ineffective counsel when you were given bad advice at the guilty plea. You would have to appeal Judge Young's decision - because Shurtleff is a judge, however, the chances are very slim.

I think your best bet is to ask the Board for a rehearing every year if necessary and to try to keep a good record. They might reduce your time if they feel you are not a risk.

I'm getting out of the prison business so I can't take your case any further. If you want some suggestions of other attorneys let me know.

Good luck

Craig

ATTACHMENT V

to weigh probabilities and "what ifs" then an evidentiary hearing should be held so that factual findings can be made concerning these predictions and probability assessments. Petitioner would assert, however that the record on its face clearly shows that he was denied effective representation of counsel by the complete failure to meet the standards of an attorney representing a defendant in a capital murder case in which a substantial sentence is extremely possible.

For these reasons, therefore, this matter should be set for hearing either on the merits or remanded for an evidentiary hearing to answer any of the questions that are pertinent to this petition.

DATED this 28th day of December, 1992.

Craig S. Cook
Attorney for Petitioner

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing to J. Frederic Voros, Jr., Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 this 28th day of December, 1992.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR BEAVER COUNTY, STATE OF UTAH

STATE OF UTAH, — Plaintiff, vs. TRACY EUGENE SMITH, Defendant.	MEMORANDUM OF POINTS AND AUTHORITIES CASE NO. 631

This matter came before the Court this date on the petitioner's Motion and Order for Appointment of Legal Counsel. The petitioner moves the Court for appointment of legal counsel to be paid by Beaver County and to pursue petitioner's most recent motion to withdraw his plea.

The defendant was convicted of murder upon his plea of guilty on November 14, 1988. Thereafter in December 1991, the defendant filed a motion to withdraw his guilty plea after having lost his direct appeal rights by inaction. The Court denied the request to withdraw the guilty plea and the matter was pursued by appeal to the Supreme Court of the State of Utah. On December 27, 1993, the Supreme Court issued its opinion addressing the claims raised by the defendant, including the letter written by this Court to the Board of Pardons recommending that the defendant serve at least 20 years. The trial court's denial of the Motion to Withdraw the plea was upheld. Thereafter the defendant herein filed a motion for an order of the Court correcting the sentence which Mr. Smith claimed was illegal. The Court issued a Memorandum Opinion on July 19, 1996, in which the defendant's motion was denied. That

which occurred or could have occurred because of counsel's conduct during the sentencing proceedings. See Petitioner's Memorandum at 10-16.

The State wishes Petitioner to be a fortune teller. The State wishes Petitioner to allege what the judge woud have done had Petitioner's attorney presented the information to him as he should have done under an effective counsel standard. Petitioner submits that there is a reasonable probability that the conduct of his counsel undermined the confidence in the outcome of the sentencing recommendation. Again, Petitioner was entitled to present reliable information to the court as part of his constitutional sentencing rights. Whether the judge would have done anything differently after this material had been presented is not the question. It is the failure to present this material which is the crux of this petition. In the context of a trial setting, it cannot be said that the complete failure of Mr. Shumate to present any evidence or arguments in the sentencing hearing was "harmless error."

The State also wishes Petitioner to prove beyond a reasonable doubt that the twenty-year recommendation made by the court conclusively caused the twenty-year sentence imposed by the Board of Pardons. This kind of proof is not required here. The mere coincidence of the twenty-year term in both proceedings establishes a "reasonable probability" that the judge's recommendation was followed by the Board of Pardons.

The State, in summary, is attempting to use technicalities to escape a clear case of possible injustice. If it is necessary

determination was appealed. On April 3, 1997, the Court of Appeals issued a Memorandum Opinion upholding the decision of the trial court.

In addition Mr. Smith filed in the 3rd-District Court the case of Smith v. Galetka, Case No. 930900217, which was a Petition for Writ of Habeas Corpus. In that case Mr. Smith raised additional claims as to the propriety of the taking of his plea. The trial court ruled against Mr. Smith in that case, and Mr. Smith did not appeal.

MOTION TO APPOINT LEGAL COUNSEL

On July 28, 1997, Mr. Smith filed yet another Motion to Withdraw Guilty Plea and Correct Illegal Sentence. He now seeks to have this Court appoint counsel to represent him and proposes to require the County of Beaver to pay the costs of that Motion and the subsequent proceedings.

Under the provisions of 78-35a-101 UCA, et. Seq., the Court has authority only to appoint pro bono counsel. There is no provision for appointments paid by the county where the conviction occurred.

This Court apparently has discretion as to whether or not to appoint counsel. (See 78-35a-109 UCA) Although this is a serious case for the petitioner in view of the long period of confinement which he is undergoing, the Court is of the opinion that Mr. Smith has had several opportunities to raise the issues which he thought were appropriate relating to his entry of his plea of guilty in this case. The Court can see no reason to appoint counsel in this case and hereby declines to do so.

The Lockhart case acknowledged that in many instances an inquiry of "prejudice" will depend on likelihoods of various circumstances and how they would have most probably affected the outcome of a trial or plea. Petitioner was entitled to be informed of all available pertinent information concerning sentencing. By not being given this information he was clearly prejudiced as a matter of law by being unable to make a knowing and voluntary decision. If he stated today that he would not have entered the plea had he known this twenty-year recommendation would be made, such a statement would be meaningless since the inquiry in these type of cases is at the time the guilty plea was made. The failure to correctly advise a defendant as to pertinent sentencing information creates automatic prejudice regardless of what outcome a defendant may have chosen had he been correctly advised.

The second portion of the argument made by the State is equally absurd. The State claims that the petition never alleges that but for counsel's errors the judge would have made a different recommendation or no recommendation at all. (Respondents' Brief at 8). This statement is simply not true. As noted in the Memorandum of Points and Authorities which was incorporated by reference in the habeas corpus petition, "had Petitioner's appointed counsel been effective the twenty-year recommendation made by the lower court at the conclusion of the sentencing proceeding may well not have been made." (Petitioner's Memorandum of Points and Authorities at 2). Moreover, Petitioner devoted seven pages of his Memorandum to showing the prejudice

Section 78-35a-109 UCA requires the court to consider two factors in deciding whether to appoint pro bono counsel. The court has considered those factors. This case raises only one issue, ie: whether the defendant can withdraw his plea of guilty. Defendant alleges that this court failed to comply with the provisions of Rule 11, U.R.Crim.P. There is no need for an evidentiary hearing as the issues can be decided from the transcripts and records of the taking of the plea. In addition, in view of the provisions of 78-35a-106 UCA and 78-35a-107 UCA, this court will be dismissing and denying the Motion because the Statute of Limitations period has passed and the claim raised by the defendant in this motion was raised and addressed in previous appeal proceedings, or should have been, or was raised and addressed in previous post conviction relief proceedings, or should have been.

The issues do not appear complicated and there is no need for an evidentiary hearing. Thus the appointment of pro bono counsel is not warranted.

The petitioner's Motion for Appointment of Legal Counsel is denied.

MOTION TO WITHDRAW GUILTY PLEA AND CORRECT ILLEGAL SENTENCE

On August 4, 1997, Mr. Smith filed a Notice to Submit for Decision and Request for Hearing on his most recent motion to withdraw the guilty plea. The Court declines to set the matter for oral argument. The Court has read the Motion submitted by Mr. Smith and the affidavits included herewith. Mr. Smith challenges the entry of the plea in this case on the grounds that he was not advised that the recommendations of the prosecution and his own attorney were not binding upon the Court.

properly advise him as to his eligibility for parole under the sentence agreed to in the plea bargain. The Supreme Court held that neither Arkansas nor Federal law required that petitioner be informed of his parole eligibility date prior to pleading guilty. The Court stated:

> We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the Federal court. 474 U.S. at 56.

In the instant case, the information which was omitted by Petitioner's counsel was not that of parole but was that of sentencing. Numerous cases hold that matters affecting the sentence of a defendant allow withdrawal of a guilty plea if all elements and facts and circumstances are not fully explained. See State v. Smith, 776 P.2d 929 (Utah 1989); State v. Copeland, 765 P.2d 1266 (Utah 1988); State v. West, 765 P.2d 891 (Utah 1988); State v. Vasilacopulous, 756 P.2d 92 (Utah App. 1988).

Once again, the State has distorted the record by failing to complete the quotation cited in Respondents' memorandum. The State makes the following assertion:

> In his affidavit he states under oath, "Had I known that the judge was going to make this kind of recommendation I don't know whether I would have entered this plea or not... (Respondents' Memorandum at 7).

The State omitted the following subsequent language of that sentence, "since the state had very weak evidence concerning the attempt to rob Mr. Bray." (Affidavit at 18).

Defendant has had repeated opportunities to raise this issue, including a prior motion to withdraw his plea. There is no new evidence alleged by defendant. The limitations period for post-conviction relief has passed. (See 78-35a-107 UCA)

Pursuant to Rule 65B(5), Utah Rules of Civil Procedure, this court now finds that this motion is frivolous, repetitive and without merit. In addition, it is unsupported by the records of the plea.

Accordingly for the reasons set out above, the Motion is denied.

DATED this 21st day of August 1997.

J. PHILIP EVES, District Court Judge

itself.

In failing to file a direct appeal, Petitioner cannot be held accountable for listening to the advice of the court-appointed attorney who is now being accused of being ineffective. Fernandez v. Cook, 783 P.2d 547 (Utah 1989). In addition, this Court has held that the writ of habeas corpus is a flexible protection to protect against the denial of a constitutional right in a criminal conviction and that the "good cause" requirement is justified for a number of reasons including the existence of fundamental unfairness in a conviction. Hearst v. Cook, 777 P.2d 1029 (Utah 1989).

Accordingly, this petition is not procedurally barred and must not be dismissed.

POINT II

THIS PETITION SHOULD NOT BE DISMISSED UNDER HILL V. LOCKHART.

The State next argues that under Hill v. Lockhart, 474 U.S. 52 (1985) Petitioner has failed to allege sufficient prejudice to allow this matter to proceed. This claim is broken by the State into two parts: first, the assertion by Petitioner that his counsel failed to inform him as to the twenty-year sentence recommendation or that the judge could make such a recommendation; and second, the other matters concerning counsel's representation during the guilty plea proceeding. These parts will now be addressed sequentially.

The Hill v. Lockhart case, contrary to the State's assertion, is not identical "in all material respects to the case at bar." In Hill the petitioner claimed his attorney failed to

ATTACHMENT VI

followed by the Board of Pardons.

Garrish involved (1) a direct appeal, (2) a full evidentiary hearing as to a subsequent motion to withdraw the guilty plea, (3) an appeal from that denial; (4) three separate habeas corpus actions; and (5) an appeal from the denial of the third habeas corpus petition. In contrast to this abundance of judicial procedure in Garrish, the petitioner in this case did not file any direct appeal from his entry of guilty plea based upon the advice of his court-appointed attorney, James Shumate. Appearing pro se, Petitioner filed a motion to withdraw the guilty plea but no evidentiary hearing was held. The Court ordered the dismissal of the motion based solely upon the record. It was not until the proceedings before this Court with Petitioner's new court-appointed attorney that the present claims in the direct appeal and habeas corpus action have been made. This blemished legal process supports the contention of Justice Zimmerman in Garrish that counsel should be provided in a thorough post conviction proceeding and appeal.

Clearly, Petitioner was not previously aware of the ineffectiveness of counsel in sentencing now being asserted in the habeas corpus action filed in this court. The State's repeated reference that he was aware of such a claim four years earlier is a complete distortion of the record. (Respondents' Brief at 4). His earlier statement in his affidavit concerning his counsel's failure to investigate the facts of the crime certainly does not preclude an ineffectiveness claim being made as to his counsel's performance during the guilty plea proceeding

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR BEAVER COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. TRACY EUGENE SMITH, Defendant.	MEMORANDUM OPINION CASE NO. 631

The defendant, Tracy Eugene Smith, entered a plea of guilty to the crime of Murder in the First Degree, a capital felony, on November 14, 1988. The Court sentenced him to serve a life sentence and recommended to the Board of Pardons that he serve at least 20 years before being allowed parole. The defendant has since filed at least one appeal and several petitions for extraordinary relief.

On May 15, 1996, the defendant caused to be filed a "Motion for an Order of Court Correcting a Sentence that was Imposed in an Illegal Manner." The defendant moves the Court to correct or modify the sentence given by deleting the Court's recommendation that the defendant serve 20 years before being paroled. The defendant correctly argues that the Court can correct an illegal sentence at any time. (See Rule 22, *Utah Rules of Criminal Procedure.*)

The alleged illegality raised by the defendant is that the Court sentenced the defendant to a life sentence and then made a recommendation pursuant to 77-27-13(5) *UCA*. The defendant argues that the Court acted illegally because that statutory provision, by its own terms, applies only to cases where an "indeterminate sentence is imposed." Defendant takes

Counsel has read the Garrish case several times and has been unable to find anywhere in the opinion that a motion to withdraw a guilty plea is considered a prior post-conviction proceeding in relation to habeas corpus petitions. Rule 20, for example, of the Utah Rules of Appellate Procedure only requests a "statement indicating whether any other petition for a writ of habeas corpus based upon the same or similar grounds has been filed and the reason why relief was denied. (Rule 20(c)(3)).

The issues in a motion to withdraw a guilty plea and a habeas corpus action can be quite distinct. In the motion to withdraw action, the question is whether the defendant made a knowing plea or whether the State and the Court breached its agreement with the defendant. In many cases involving guilty plea motions no claim whatsoever is made of ineffectiveness of counsel. Likewise, a claim of ineffectiveness of counsel in a habeas corpus action may have nothing whatsoever to do with the entry of the guilty plea. It is for this reason that two post-conviction remedies cannot be used as procedural bars in the sense of two successive petitions for habeas corpus.

The distinction in Garrish and the instant case is remarkable. Garrish was convicted of child abuse and was ultimately sentenced to a minimum mandatory term of six years to life. During the proceedings he was represented by three separate attorneys. Here, Petitioner, who was 21 years old at the time of the conviction, was represented by only one attorney and was sentenced to life imprisonment with a twenty-year recommendation of imprisonment. This recommendation is now being

the position, citing no authority supporting his view, that a life sentence is not an indeterminate sentence.

The Court now holds that the position of the defendant is incorrect under the Utah sentencing scheme. In fact a life sentence for Murder, a capital felony, is an indeterminate sentence. Therefore the sentence is not illegal.

Under Utah's sentencing scheme, all commitments to prison are considered indeterminate sentences unless otherwise provided by law. (77-18-4 *UCA*) Utah's Constitution and statutes provide for a Board of Pardons which body is charged with the authority and responsibility of determining whether a sentence will be fully served, modified, or terminated. (See 77-27-5 *UCA*; Andrus v. Turner, 590 P.2d 363; Raslins v. Holden, 869 P-2d 958.)

The Board of Pardons has unfettered discretion in carrying out its function and its decisions are not subject to judicial scrutiny, except in limited cases.

An indeterminate sentence is one fixed by the sentencing authority (the Court) as a maximum sentence or within a possible minimum/maximum range, understanding that the actual time to be serve will be later determined by another entity, the Board of Pardons.[1] The alternative plan, determinate sentencing, is used in some states and jurisdictions. Under determinate sentencing the Court fixes the exact number of years, months or days to be served by the defendant and no other entity has authority to require more or less, as long as the sentence is legally permissible. This is not Utah's approach to sentencing.

---

[1]See Mutart v. Pratt, 170 P.67; State v. Empey, 239 P.25; Lee Lim v. Davis, 284 P.232.

Minute Entry substantiates Petitioner's claim by the following statement:

> This matter was called on for hearing at the request of the defendant. Mr. Shumate informed and the defendant concurred that the motion be voluntarily withdrawn. Mr. Shumate stated that the defendant will pursue his requested relief in the Federal court system. The appeal was ordered withdrawn. (R. 86).

The motion to withdraw the guilty plea was filed on December 4, 1991 by the petitioner pro se. His sole grounds for the petition was that there was insufficient evidence to charge him with first degree murder.

ARGUMENT

POINT I

THIS PETITION IS NOT PROCEDURALLY BARRED SINCE PETITIONER COULD NOT HAVE BROUGHT HIS INEFFECTIVE ASSISTANCE CLAIM IN HIS PRIOR MOTION TO WITHDRAW HIS GUILTY PLEA.

The State argues that since Petitioner did not raise the ineffectiveness of counsel in his motion to withdraw the guilty plea he is now barred from raising it in this habeas corpus action. The State cites the case of Garrish v. Barnes as standing for the proposition "a motion to withdraw a guilty plea is a prior post-conviction proceeding for procedural bar purposes." Again, the State completely distorts the status of Utah law. In Garrish this Court held that Garrish was procedurally barred by failing to raise the issue of the breached plea bargain on appeal from the denial of the motion to withdraw the guilty plea. This Court did not hold that the motion to withdraw the guilty plea precluded a subsequent habeas corpus action.

A life sentence for capital murder is an indeterminate sentence modifiable by the Board of Pardons. Otherwise the Court's recommendation of 20 years before parole would be irrelevant and meaningless and this Motion would never have been made. It is evident that the Utah Legislature considers a life sentence for capital murder as an indeterminate sentence, since it has enacted, since the sentencing in this case, a new possible sentence in such cases, life without possibility of parole. (See 76-3-201 *UCA*)

The defendant's Motion is denied. The sentence in his case was not illegal as he complains.

DATED this 3rd day of July 1996.

J. PHILIP EVES, District Court Judge

important facts. For example, the State makes the following quotation:

> Petitioner therein stated that he had been assured by his attorney "that a timely notice of appeal would be filed with this Court, base[d] upon but not limited to effective assistance of counsel." (R. 69). (Respondent's Memorandum, at 2).

Respondents conveniently left out the last sentence that Petitioner wrote following that quoted by the respondents. It stated, "That counsel did not fully investigate the facts of the case at bar that could have proven the defendant's innocence." (R. 69). Thus, contrary to the State's repeated assertions, any mention of ineffective counsel in this prior motion had nothing whatsoever to do with the proceedings of the guilty plea but instead concerned a claim that counsel failed to investigate the facts of the killing.

A second serious omission concerns the facts and circumstances relating to the "notice of belated appeal." On January 27, 1989 the Clerk of this Court sent a notice to the Beaver County Clerk that a notice of appeal had been filed in Case No. 890027 (R. 74). On March 20, 1989 a hearing was held before the Honorable J. Philip Eves. Defendant was once again represented by his court-appointed attorney, James L. Shumate. If the question of this appeal becomes relevant, Petitioner would proffer that in his conversations with Mr. Shumate he was informed that he could not raise any claim of ineffectiveness of counsel on appeal and that therefore he should go into the Federal court and file a habeas corpus action if he was unhappy with Mr. Shumate's performance concerning the investigation. The

ATTACHMENT VII

CRAIG S. COOK, No. 713
Attorney for Defendant-Appellant
3645 East 3100 South
Salt Lake City, Utah 84109
Telephone: 485-8123

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

TRACY EUGENE SMITH,

Petitioner,

vs.

HANK GALETKA, North Point Warden, UTAH STATE PRISON and THE STATE OF UTAH,

Respondents.

MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS HABEAS PETITIC

No. 920553

This Memorandum is written in opposition to Respondents' Motion to Dismiss the Petition for Writ of Habeas Corpus filed on December 18, 1992.

The State has distorted the factual record in this case as well as applicable case law, and has failed to correctly analyze the facts and legal principles as they apply to this case. For these reasons, therefore, Petitioner is compelled to respond to its Memorandum.

STATEMENT OF THE CASE

The State attempts to argue that Petitioner in December of 1988 had the opportunity of filing a direct appeal in this matter and did not do so. The State has left out, however, several

FILED

NOV 15 1988

Paul B. Baxter Clerk
Deputy

LEO G. KANELL
Beaver County Attorney
Attorney for Plaintiff
P. O. Box 471
Beaver, Utah 84713
Telephone: 438-2351

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF BEAVER, STATE OF UTAH

STATE OF UTAH,	:	STATEMENT OF DEFENDANT REGARDING PLEA BARGAIN,
Plaintiff	:	CERTIFICATES OF COUNSEL, AND ORDER
vs.	:	
TRACY EUGENE SMITH,	:	Criminal No. 631
Defendant.	:	

STATEMENT OF DEFENDANT REGARDING PLEA AGREEMENT

JS I, TRACY EUGENE SMITH, the above-named Defendant, under oath, hereby acknowledge that I have entered a plea of guilty to the charge of MURDER IN THE FIRST DEGREE, a capital offense, as contained in the Information on file against me in the above-entitled Court, a copy of which I have received, and I understand the charge to which this plea of guilty is entered is a capital felony and that I am entering such plea voluntarily and of my own free will after conferring with my attorney, JAMES L. SHUMATE, and with the knowledge and understanding of the following facts:

ATTACHMENT II.

JS 1. I know that I have constitutional rights under the Constitutions of Utah and the United States to plead not guilty and to have a jury trial upon the charges to which I have entered a plea of guilty or to a trial by the Court should I elect to waive a trial by jury. I know that I have a right to be represented by counsel and that I am in fact represented by JAMES L. SHUMATE as my attorney.

JS 2. I know that if I wish to have a trial upon the charges, I have a right to be confronted by the witnesses against me by having them testify, in open court, in my presence and before the Court and jury and that I have the right to have those witnesses cross-examined by my attorney. I also know that I have the right to have witnesses subpoenaed by the State, at its expense, to testify in Court upon my behalf and that I could, if I elected to do so, testify in Court upon my own behalf and that, if I choose not to do so, the jury can and will be told that this fact may not be held against me if I choose to have the jury so instructed.

JS 3. I know that if I were to have a trial, the State must prove each and every element of the crime charged to the satisfaction of the Court or jury beyond a reasonable doubt; that I would have no obligation to offer any evidence myself and that any verdict rendered by a jury, whether it be that of guilty or not guilty, must be by unanimous agreement of all jurors.

C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

I, PAUL G. MCMULLIN, CSR, RPR, a Notary Public, in and for the County of Washington, State of Utah, do hereby certify:

That, the foregoing matter, to wit, STATE OF UTAH VS. TRACY EUGENE SMITH, CRIMINAL NO. 631, was taken down by me in shorthand at the time and place therein named and thereafter reduced to computerized transcription under my direction.

I further testify that I am not interested in the event of the action.

WITNESS my hand and seal this 23rd day of December, 1988.

Paul G. McMullin

PAUL G. MCMULLIN, CSR, RPR

RESIDING AT: St. George, Utah

MY COMMISSION EXPIRES: 6-17-91

NOTARY PUBLIC
STATE OF

JS 4. I know that under the Constitutions of Utah and of the United States I have a right against self-incrimination or a right not to give evidence against myself and that this means that I cannot be compelled to testify in Court upon trial unless I choose to do so.

JS 5. I know that under the Constitution of Utah, if I were tried and convicted by a jury or by the Court, I would have a right to appeal my conviction and sentence to either the Court of Appeals or the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, those costs would be paid by the State without cost to me and that I would have the right to have the assistance of counsel on such appeal.

JS 6. I know and understand that by entering a plea of guilty I am waiving my constitutional rights as set out in the five preceding paragraphs and that I am, in fact, fully incriminating myself by admitting that I am guilty of the crimes to which my plea of guilty is entered.

JS 7. I know that under the laws of Utah the maximum sentence that can and may be imposed upon my plea of guilty to the charges identified on page one of this affidavit is:

A. Death or life imprisonment.

and that the imprisonment may be for consecutive periods if my plea is to more than one charge. I also know that if I am on probation, parole or awaiting sentencing upon another offense of

MR. SMITH: Yes, sir.

THE COURT: All right. Good luck.

(Whereupon the proceedings in the above-entitled matter were concluded.)

which I have been convicted or to which I have pleaded guilty, my plea in the present action may result in consecutive sentences being imposed on me.

JS 8. I know that the fact that I have entered a plea of guilty does not mean that the Court will not impose either a fine or sentence of imprisonment upon me and no promises have been made to me by anyone as to what the sentence will be if I plead guilty or that it will be made lighter because of my guilty plea.

JS 9. No one has forced or threatened or coerced me to obtain my plea of guilty and I am doing so of my own free will and after discussing it with my attorney. I know that any opinions he may have expressed to me as to what he believes the Court may do are not binding upon the Court.

JS 10. No promises of any kind have been made to induce me to plead guilty except that I have been told that if I do plead guilty, the State has agreed to not request the death penalty and to not present any aggravating evidence at the hearing before the court. I have also been informed that my plea of guilty to the offense of FIRST DEGREE MURDER, a capital offense, is conditional upon the court's imposition of a sentence of life imprisonment. I understand that should the court impose the death penalty, I may withdraw my plea of guilty and require the State of Utah to go forward with a trial in the matter. I am also aware that any charge or sentencing concessions or recommendations for probation or suspended sentences, including a

Altered plea

THE COURT: Mr. Kanell, will you prepare the commitment papers and the judgment?

MR. KANELL: Would you like -- would it be appropriate to indicate in the order that a firearm was used in the commission of the offense?

THE COURT: Well, there hasn't been a plea taken to that, but I think the factual basis, as we stated it, is clear.

Perhaps what I would prefer you do is obtain a copy of the transcript of today's proceedings, and you may attach that, if you wish, when we send it up to the board of pardons.

MR. KANELL: Okay. Thank you.

THE COURT: All right. Anything else to be taken care of?

MR. SHUMATE: No, Your Honor.

THE COURT: Thank you. Good luck, Mr. Smith.

I need to inform you of one other matter, Mr. Smith. You have the right to appeal the decisions of this Court today. That right to appeal begins to run today. If you want to appeal, you have to file notice of your intent to appeal with the clerk within 30 days of today's date. If you fail to do that, you lose your right to appeal.

Do you understand your right to appeal?

reduction of the charges for sentencing made or sought by either defense counsel or the prosecutor are not binding on the Court and may or may not be approved or followed by the Court.

TS 11. I am not now under the influence of either drugs or alcohol.

TS 12. I have read this Statement or I have had it read to me by my attorney and I have placed my initials beside each paragraph to indicated that I know and understand its contents. I am 21 years of age, have attended school through the 12 and I can read and understand the English Language. I have discussed its contents with my attorney and I ask the Court to accept my plea of guilty to the charges set forth above in this statement because I did, in fact,

(1) on the 3rd day of October, 1988, intentionally and knowlingly caused the death of JAMES GLEN BRAY, while engaged in the commission of an attempted, aggravated robbery;

(2) That I did so within Beaver County, State of Utah.

DATED this 14th day of November 1988.

Tracy Eugene Smith

TRACY EUGENE SMITH
Defendant

THE COURT: Mr. Kanell, anything?

MR. KANELL: Your Honor, pursuant to the plea agreement, the State does not have any evidence of aggravating circumstances to present, and the State does not request the Court to sentence the defendant to the death sentence.

THE COURT: Does not request that?

MR. KANELL: Does not request that.

THE COURT: All right.

MR. KANELL: The State requests the Court to sentence the defendant to life in prison.

THE COURT: Anything else?

MR. SHUMATE: I'll submit it, Your Honor.

THE COURT: All right. Tracy Eugene Smith, having been convicted by your own plea of the offense of murder in the first-degree, a capital offense, in violation of the laws of the State of Utah, I now sentence you to the Utah State Prison for the rest of your natural life.

I'm also going to make a recommendation to the board of pardons, which I would like included in the order, that Mr. Smith serve 20 years before he's considered to be released from the Utah State Prison.

Anything else?

MR. SHUMATE: No, Your Honor.

CERTIFICATE OF DEFENSE ATTORNEY

I certify that I am the attorney for TRACY EUGENE SMITH, the Defendant above-named, and I know the Defendant has read the Affidavit or that I have read it to the Defendant; I have discussed it with the Defendant and believe that the Defendant fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the Defendant's criminal conduct are correctly stated, and these, along with the other representations and declarations made by the Defendant in the foregoing Statement are, in all respects, accurate and true.

DATED this 14th day of November, 1988.

JAMES L. SHUMATE
Attorney for Defendant

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in its case against TRACY EUGENE SMITH, Defendant. I have reviewed the Statement of the Defendant and find that the declarations, including the elements of the offense of the charge(s) and the factual synopsis of the Defendant's criminal conduct which constitutes the offense(s) are true and correct. No improper inducements, threats, or coercions to encourage a plea have been offered to the Defendant. The plea negotiations

right?

MR. SMITH: Yes, sir.

THE COURT: All right. You realize that and I've already told you that if I sentence you today, it's going to be to the state prison for the rest of your life.

Do you understand that?

MR. SMITH: Yes, sir.

THE COURT: And having that in mind, do you still wish to waive your right to a delay?

MR. SMITH: Yes, sir.

THE COURT: All right. The record will reflect that waiver.

Does either counsel wish to present anything before I impose sentence?

Mr. Shumate?

MR. SHUMATE: No, Your Honor.

THE COURT: Mr. Smith, do you wish to make a statement in your own behalf before I impose sentence?

MR. SMITH: I'm sorry for what happened. I wish, you know, if he could feel my apology. I know that it can't bring him back, but I didn't mean to do it.

THE COURT: Anything else?

MR. SMITH: That's it.

are fully contained in this Statement and in the attached plea agreement or as supplemented on the record before the Court. There is reasonable cause to believe the evidence would support the conviction of the Defendant for the offense(s) for which the plea(s) are entered and acceptance of the plea(s) would serve the public interest.

DATED this 14th day of November, 1988.

LEO G. KANELL
Beaver County Attorney

ORDER

Based upon the facts set forth in the foregoing Statement of Defendant regarding Plea Bargain and the foregoing Certificates of Counsel, the Court finds the Defendant's plea of guilty is freely and voluntarily made, and it is so ordered that the Defendant's pleas of "guilty" to the charge(s) set forth in the foregoing Statement be accepted and entered.

The foregoing Statement of Defendant was signed before me this 14th day of November, 1988.

J. PHILIP EVES
District Court Judge

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find that this plea is governed by the provisions of the Alford decision -- Alford versus North Carolina. And I'm going to accept it on both of those bases, and I'm going to order the plea of guilty entered.

Recommendations regarding sentencing in the matter?

MR. SHUMATE: Your Honor, Mr. Smith would ask the Court to allow him to waive the statutory time and proceed with sentencing at this time rather than to order the preparation of a presentence report, in view of the nature of the plea and the circumstances of the facts before the Court.

I don't think that the Court sentencing alternatives are substantial at all, and we're prepared to go forward with that at this time.

THE COURT: All right. Does the State have any objection?

MR. KANELL: The State does not oppose that.

THE COURT: All right. Mr. Smith, just so you're clear on this, the law allows you two days before you're sentenced and up to 30 days for sentencing. And you have the right to take advantage of that delay if you wish.

Your counsel's indicated that you want to give up that right and be sentenced today; is that